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Extract of a Letter from Chancellor Kent to the Author,

New York, August 27, 1840.

Dear Sir:

"I am much pleased with the ability, fidelity and accuracy with which you have stated the Answers as drawn from the Text. I approve of the work and wish it success, for I think it is well calculated to facilitate and promote the study and diffusion of the elementary principles of constitutional and municipal law embodied in the commentaries."

JAMES KENT.

John Eldridge

THE

MOST IMPORTANT PARTS

OF

KENT'S COMMENTARIES,

REDUCED TO

QUESTIONS AND ANSWERS.

BY

ASA KINNE.

SECOND EDITION.

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1840.

DISTRICT OF COLUMBIA, TO WIT:

Be it remembered, that on the twenty-sixth day of October, Anno Domini, eighteen hundred and thirty-eight, Asa Kinne of the said District, deposited in this office the title of a book, the title of which is in the words following: "The most important parts of Kent's Commentaries, reduced to questions and answers; by Asa Kinne:" the right whereof he claims as proprietor. In conformity with an Act of Congress, entitled "An act to amed the several acts respecting Copy Rights."

EDM. J. LEE, *Clerk of the District.*

In conformity that the above is a true copy, from the records of the District Court for the District of Columbia, I, Edm. J. Lee, the Clerk thereof, have hereunto set my hand and affixed the seal of my office, this twenty-sixth day of October, eighteen hundred and thirty-eight.

EDM. J. LEE, *C. D. C.*

Entered according to an Act of Congress, in the year 1838, by Asa Kinne, in the Clerk's Office of the District Court for the District of Columbia.

DEAN, PRINTER.

TO THE

HON. JAMES KENT, L.L.D.

LATE CHANCELLOR OF THE STATE OF NEW YORK,

THIS VOLUME IS INSCRIBED,

WITH SENTIMENTS OF THE MOST PROFOUND RESPECT AND ESTEEM

FOR HIS TALENTS AND INTEGRITY, AND THE RARE

COMBINATION OF VIRTUES WHICH GUIDED HIM

IN THE DISCHARGE OF HIS DUTIES AS

A PUBLIC OFFICER, AND ADORN

HIS CHARACTER IN

PRIVATE LIFE.

PREFACE.

To demonstrate the usefulness of the following work, which is now offered to the public generally, as well as to the legal profession, a preface might be deemed a work of supererogation, as its utility must be obvious to the general reader.

The few remarks which follow, are given more out of a compliance to custom, than as an apology for the work itself.

A writer in the British Register very judiciously observes, that "Of the subjects of human knowledge, law is far from being the least important; within the last fifty years, not only general law, but the law of the country in which we live, has been considered as an object of liberal inquiry, and well deserving the attention of the general scholar."

The labours of the venerable chancellor Kent, have contributed in no small degree to disseminate this branch of useful knowledge; through his unwearying exertions and untiring zeal, this beautiful, but abstruse and difficult study has been rendered at once pleasing and instructive.

"The work of Sir William Blackstone, by the elegance of its style, its lucid arrangement and finished execution, is so well adapted to render the study of the law attractive, and to give a knowledge of the constitution and laws of England, well deserving the attention of every liberal mind, that it has been, (though for many years, more from necessity than choice,) very properly placed in the hands of every law student, but as much of those admirable Commentaries relate to the political constitution of England, so different from our own, to its peculiar institutions, and to rights and duties, public and private, not existing in this country; an American work, exhibiting our own constitution, laws, usages, and civil relations, had long been wanted. In the full maturity of his understanding, with a mind long habituated to legal investigations and researches, and with sound and enlightened views of jurisprudence, no man, perhaps, could have been better fitted, than chancellor KENT to execute such a work, and it may diminish, in some degree, the regret felt for the loss sustained by the public and the legal profession, in being deprived of his

valuable services on the bench, to know how usefully to the world, and honourably to himself, he has employed his time and talents in its performance."*

Since its publication the demand for it has been very great. I will even presume to say, that no work of the kind ever attained so great a circulation in so short a time,† the masterly production of judge Blackstone not excepted. In the southern and western portions of our republic it is to be found in almost every family, and indeed its circulation has become so general, as to warrant the assertion that there are few individuals of polished education, who have not read "Kent's Commentaries;" and in the libraries of the learned of every profession, they will ever hold a conspicuous place.

It will be seen that the present work is intended to be a companion to, and not a substitute for, the Commentaries themselves, and it is obvious to the most superficial observer, that it does not contain all that is necessary to be known of the original; on the contrary, its object is to assist the student in the perusal of the Commentaries. The compiler has found the manuscript to be of incalculable benefit to himself, in the progress of his studies, and the advantages which he has himself derived from it, he now wishes to extend to his professional friends, and to the *literati* in general.

* American Portrait Gallery, No. XVII., p. 10.

† The first volume appeared November, 1826; the second volume was published in November, 1827; the third in 1828, and the fourth in 1830.

PREFACE

TO THE SECOND EDITION.

In publishing the present edition of his compendium of the Commentaries on American Law, the compiler deems it proper to state that the first edition which consisted of a few copies only and which was hastily printed from old manuscript, has (owing to the unprecedented popularity of the Commentaries themselves and the great and well earned fame of the Commentator, which renders every thing in law literature with which it is connected an object of interest to the American public,) met with an unexpected demand. In consequence of which a larger edition is now published, and in which is incorporated more than one hundred pages of important matters not contained in the former edition. An Index and Glossary are also affixed, referring to question and page, which it is hoped will be some addition to the general utility of the work.

N. B. The Commentaries referred to are the third edition, published in 1836.

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KENT'S COMMENTARIES,

REDUCED TO

QUESTIONS AND ANSWERS.

LECTURE I.

OF THE FOUNDATION AND HISTORY OF THE LAW OF NATIONS.

1. When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, to what rules did they become subject ?—1

They became subject to that system of rules which reason, morality, and custom, had established among the civilized nations of Europe, as their public law.

2. What did congress claim, and to what did they profess obedience, during the war of the American revolution ?—1

They claimed cognizance of all matters arising upon the law of nations, and they professed obedience to that law, according to the general usages of Europe.

3. What are we to understand by that law ?—1

That code of public instruction which defines the rights, and prescribes the duties of nations in their intercourse with each other. The faithful observance of this law is essential to national character, and to the happiness of mankind.

4. Upon what, "according to the observation of *Montesquieu*," is it founded ?—1

It is founded on the principle that different nations ought to do as much good in peace, and as little harm in war as possible, without injury to their true interests.

5. What difference of opinion has existed between writers concerning the foundation of international law ?—2

It has been considered by some as a mere system of positive institutions, founded upon consent and usage; while others have insisted that it was essentially the same as the law of nature applied to the conduct of nations in the character of moral persons, susceptible of obligations and laws. But it would be improper to separate this law entirely from natural jurisprudence, and not to consider it as deriving much of its force, and dignity, and sanction, from the same principles of right reason, and the same views of the constitution and nature of man, as those from which the science of morality is deduced. We ought not, therefore, to separate the science of public laws from that of ethics, nor encourage the dangerous suggestion, that governments are not so strictly bound by the obligations of truth, justice, and humanity, in relation to other powers, as they are in the management of their own local concerns.

6. How is the law of nations divided?—2

Into natural and positive.

7. How are states, or bodies politic, to be considered?—3

As having a public will, capable and free to do right or wrong.

8. Of what does the law of nations consist?—3

It is a complex system, composed of various ingredients. It consists of general principles of right and justice, equally suitable to the government of individuals in a state of natural equality, and to the relation and conduct of nations; of a collection of usages and customs, the growth of civilization and commerce; and a code of conventional or positive law. In the absence of these latter regulations, the intercourse and conduct of nations are to be governed by principles fairly to be deduced from the rights and duties of nations, and the nature of moral obligation.

9. Is international law of ancient or modern origin?—4

As understood by the European world, and by us, it is the offspring of modern times. The most refined states among the ancients, seem to have had no conception of the moral obligations of justice and humanity between nations, and there was no such thing in existence as the science of international law. They regarded strangers and enemies as nearly synonymous, and considered foreign persons and property as lawful prize. Their laws of war and peace were barbarous and deplorable. So little were mankind accustomed to regard the rights of persons or property, or to perceive the beauty of public order, that, in the most enlightened ages of the Grecian republics, piracy was regarded as an honourable employment. There were powerful Grecian states that avowed its practice; and the fleets of Athens, the best disciplined and most respectable naval force in all antiquity, were exceedingly addicted to piratical excursions.

10. What was the received opinion among the Greeks as to the reciprocal rights and duties of their own cities and states between themselves?—4

That they were bound to no duties, nor by any moral law, without compact, and that prisoners taken in war had no rights, and might lawfully be put to death, or sold into perpetual slavery, with their wives and children. There were, however, many feeble efforts, and some successful examples are to be met with in Grecian history, in favour of national justice. The object of the Amphictyonic council was to institute a law of nations among the Greeks, and settle contests between Grecian states by a pacific adjustment.

11. What was the practice of the Romans, in their intercourse with foreign states?—5

They exhibited much stronger proofs than the Greeks of the influence of regular law, and there was a marked difference between those nations in their intercourse with foreign powers. It was a principle of the Roman government, that none but a sworn soldier might lawfully fight the enemy. The institution of the college of heralds and the fecial law, were proofs of a people considerably advanced in the cultivation of the law of nations as a science; and yet with what little attention they were accustomed to listen to the voice of justice and humanity, appears but too plainly in their haughty triumphs, their cunning interpretation of treaties, their continual violation of justice, their cruel rules of war, and the whole series of their wonderful successes, in the steady progress of the conquest of the world.

12. What was the Roman jurisprudence in its most cultivated state?—8

It was a very imperfect transcript of the precepts of natural justice, on the subject of national duty. It retains strong traces of ancient rudeness, from the want of the Christian system of morals, and civilizing restraints of commerce; we find the barbarous doctrine still asserted, that prisoners of war became slaves *jure gentium*, and even in respect to foreign nations with whom the Romans were at peace, but had no particular alliance, it is laid down in the digests, that whoever passed from one country to another, became immediately a slave.

13. What was the state of international law during the early part of the middle ages?—8?

The irruption of the northern tribes of Scythia and Germany, overturned all that was gained by the Roman law, annihilated every restraint, and all sense of national obligation, and civil society relapsed into violence and confusion. Mankind seemed to be doomed to live once more in constant distrust or hostility, and to regard a stranger and an enemy as almost the same. Piracy, rapine, and ferocious warfare, deformed the annals of Europe. The manners of the nations were barbarous, and their maxims of war cruel.

14. What nations are spoken of as early exceptions to this general barbarity?—8

The Visigoths, Saxons, Cicilians and Bavarians, whose laws are cited

by Mr. Barrington, as restraining, by the severest penalties, the plunder of shipwrecked goods, and the abuse of shipwrecked seaman, and as extending the rights of hospitality to strangers. But notwithstanding a few efforts of this kind to introduce order and justice, and though municipal law had undergone great improvement, the law of nations remained in the rudest and most uncultivated state down to the period of the 16th century.

15. By what means did the Emperor Charlemagne endeavour to improve the condition of Europe ?—9

By the introduction of order, and the propagation of Christianity; and we have cheering examples, during the darkness of the middle ages, of some recognition of public laws, by means of alliances, and the submission of disputes to the arbitrament of a neutral power.

16. What five institutions are enumerated by Mr. Ward, existing about the period of the 11th century, and which in a very essential degree contributed to improve the law of nations ?—9

1. The feudal system. 2. The concurrence of Europe in one form of religious worship. 3. The establishment of chivalry. 4. The negotiations and treaties forming the conventional law of Europe. 5. The settlement of a scale of political rank and precedency; but of all the causes of reformation, the most weight is to be attributed to the intimate alliance of the great powers as one Christian community.

17. What was the influence of Christianity ?—10

It was very efficient toward the introduction of a better and more enlightened sense of right and justice among the governments of Europe. It taught the duty of benevolence to strangers, of humanity to the vanquished, of the obligation of good faith, and of the sin of murder, revenge, and rapacity.

18. What were the principal means by which the church acquired and exercised its authority ?—10

By its councils, or convocations of clergy, which formed the nations professing Christianity into a connection resembling a federal alliance; and those councils sometimes settled the titles and claims of princes and regulated the temporal affairs of the Christian powers. The confederacy of the Christian nations was bound together by a sense of common duty and interest, in respect to the rest of mankind.

19. What was then the general principle of belief and action ?—10

That it was not only right, but a duty, to reduce to obedience, for the sake of conversion, every people who professed a different faith from their own. To make war upon infidels, was, for many ages, a conspicuous part of European law; and this gross perversion of the doctrines and spirit of Christianity, had at least one propitious effect upon the Christian powers, inasmuch as it led to the cultivation of peace and union be-

tween them, and to a more free and civilized intercourse. The notion that it was lawful to invade and subdue Mahometan and pagan countries, continued very long to sway the minds of men; and it was not till after the age of Grotius and Bacon, that this error was entirely eradicated. Lord Coke held, that an alliance for mutual defence was unlawful between Christians and Turks; and Grotius was very cautious as to the admission of the lawfulness of alliances with infidels, and he had no doubt that all Christian nations were bound to assist each other against the attacks of the infidels. Even Lord Bacon thought it a matter of so much doubt, as to propound it seriously as a question, whether a war with infidels was not the first in order of dignity, and to be preferred to all just temporal quarrels; and whether a war with infidels might not be undertaken merely for the propagation of the Christian faith, without other cause of hostility.

20. What influence had chivalry upon the laws of war?—11

It introduced declarations of war by heralds; and to attack an enemy by surprise was deemed cowardly and dishonourable. It dictated humane treatment to the vanquished, courtesy to enemies, and the virtues of fidelity, honour, and magnanimity, in every species of warfare.

21. What influence had the introduction of the civil law?—11

It contributed largely to more correct and liberal views of the rights and duties of nations. This grand monument of the embodied wisdom of the ancients, when once known and examined, must have reflected a broad stream of light upon the feudal institutions, and the public councils of the European nations. We accordingly find that the rules of the civil law were applied to the government of national rights, and they have contributed very materially to the erection of the modern international laws of Europe. From the 13th to the 16th century, all controversies between nations were adjudged by the rules of the civil law.

22. What effect had treaties, conventions, and commercial ordinances, upon the law of nations?—12

They gave to it a new character, and rendered it more and more a positive or instituted code.

23. What was the object of commercial ordinances and conventions?—12

To improve and refine public law and the intercourse of nations, by protecting the persons and property of merchants in cases of shipwreck, and against piracy, and against seizure, and arrest upon the breaking out of war.

24. What is understood by an auxilliary treaty?—12

A defensive treaty.

25. What effect was given to those treaties?—12

One nation was allowed to be an enemy to a certain extent only.—Thus, if, in time of peace, a defensive treaty had been made between one of the parties to a subsequent war and a third power, by which a certain number of troops were to be furnished in case of war, a compliance with this engagement implicated the auxiliary as a party to the war, only so far as her contingent was concerned. The nations of Europe had advanced to this extent in diplomatic science so early as the beginning of the 13th century, and such a refinement was wholly unknown to the ancients.

26. What was understoood by a treaty of subsidy?—12

It was a treaty by which the troops of one nation, to a definite extent, could be hired for the service of one of the belligerents, without affording ground for hostility with the community which supplied the specific aid.

27. What does the efforts that were made upon the revival of commerce, to suppress piracy, and protect shipwrecked property, show?—13

They show a returning sense of the value and obligations of national justice. The case of shipwrecks may be cited as a particular and strong instance of the feeble beginnings, the slow and interrupted progress, and final and triumphant success, of the principles of public right.

28. What two emperors had the honour of having first renounced their claim to shipwrecked property, in favour of the owners?—13

Hadrian and Antonius.

29. What contributed gradually to suppress the criminal practice of plundering or confiscating all shipwrecked property, and of treating mariners, who were thus unfortunate, as pirates?—13

The revival of commerce, and with it a sense of the value of order, commercial ordinances, particular conventions, and treaties between sovereigns, by rendering the regulations upon that subject a branch of the public law of nations.

30. To what is imputed the progress of humanity in the treatment of prisoners?—14

To the influence of conventional law, establishing a general and indiscriminate exchange of prisoners, rank for rank, and giving protection to cartel ships for that purpose.

31. What effect was produced by the admission of resident ambassadors at each sovereign's court?—15

It was an important improvement in the security and facility of national intercourse; and this led to the settlement of a great question, which

was frequently discussed in the 15th and 16th centuries, concerning the inviolability of ambassadors. It became at last to be a definitive principle of public law, that ambassadors were exempt from all local jurisdiction, civil and criminal.

LECTURE II.

OF THE RIGHTS AND DUTIES OF NATIONS IN A STATE OF PEACE.

1. How do nations, in a state of peace, stand in relation to each other ?—21

They are equal, and entitled to claim equal consideration for their rights, whatever may be their relative dimensions or strength, or however greatly they differ in government, religion, or manners. This perfect equality, and entire independence of all distinct states, is a fundamental principle of public law. It is a necessary consequence of this equality, that each nation has a right to govern itself as it may think proper, and no one nation is entitled to dictate a form of government, or religion, or a course of internal policy, to another. No state is entitled to take cognizance or notice of the domestic administration of another state, or of what passes within, as between the government and its own subjects.

2. What circumstances may justify an interference ?—23

An impending danger arising from the domestic policy of another state. A rational fear is said to be a justifiable cause of war. The danger must be great, distinct, and imminent, and not rest on vague and uncertain suspicion. The British government officially declared to the allied powers in 1821, that no government was more prepared than their own, "to uphold the right of any state or states to interfere where their own security or essential interests were seriously endangered by the internal transactions of another ;—that the assumption of the right was only to be justified by the strongest necessity, and to be limited and regulated thereby;—that it could not receive a general and indiscriminate application to all revolutionary movements, without reference to their immediate bearing upon some particular state or states ;—that its exercise was an exception to general principles of the greatest value and importance, and as one that only properly grows out of the circumstances of the special case ; and exceptions of this description could never, without the utmost danger, be so far reduced to rule, as to be incorporated into the ordinary diplomacy of states, or into the institutes of the law of nations." No form of civil gov-

ernment which a nation may think proper to prescribe for itself, can be admitted to create a case of necessity, justifying an interference by force.

3. How are treaties affected by a change of government?—25

It is well understood that treaties are not affected, nor positive obligations of any kind with other powers, or creditors, weakened by any such mutations. A state neither loses any of its rights, nor is discharged from any of its duties, by a change of government.

4. What if a state be divided in respect to territory?—25

Its rights and obligations are not impaired; and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled, by all the parts in common.

5. What extent of jurisdiction may a nation exercise over adjoining seas?—26

That is often a difficult question, and of dubious right. As far as a nation can occupy, and that occupancy is acquired by prior possession or treaty, the jurisdiction is exclusive. Navigable rivers which flow through a territory, and the sea-coast adjoining it, and navigable waters included in bays and between headlands and arms of the sea, belong to the sovereign of the adjoining territory. The open sea is not capable of being possessed as private property.

6. How does the law of nations regard the freedom of trade?—32

As an imperfect right, and necessarily subject to such regulations and restrictions, as each nation may think proper to prescribe for itself. Every state may monopolize as much as it pleases of its own internal and colonial trade, or grant to other nations, with whom it deals, such distinctions and particular privileges as it may deem conducive to its interest.

7. How far does the right to make commercial treaties extend?—34

Every nation may enter into such commercial treaties, and grant such special privileges as they may think proper; and no nation to whom the like privileges are not conceded, has a right to take offence, provided those treaties do not affect their perfect rights. A state may enter into a treaty, by which it grants exclusive privileges to one nation, and deprives itself of the liberty to grant similar privileges to any other.

8. What is the law of nations, upon the right of passage over foreign territory?—34

That every nation is bound in time of peace to grant a passage for lawful purposes, over their lands, rivers, and seas, to the people of other states, whenever it can be permitted without inconvenience; and burthensome conditions ought not to be annexed to the transit of persons and property. If, however, the government deems the introduction of foreign-

ers, or their merchandise, injurious to those interests of their own people, which they are bound to protect and promote, they are at liberty to withhold the indulgence. The entry of foreigners and their effects is not an absolute right, but only one of imperfect obligation, and it is subject to the discretion of the government which tolerates it.

9. What if a nation possess only the upper parts of a navigable river? —35

She is entitled to descend to the sea without being embarrassed with useless and oppressive duties or regulations. It is doubtless a right of an imperfect obligation, but one that cannot justly be withheld without good cause.

10. What is the opinion as to the obligation of states to deliver up criminals fleeing from justice?—36

It is declared by some of the most distinguished public jurists, that every state is bound to deny an asylum to criminals, and upon application and due examination of the case, to surrender the fugitive to the foreign state where the crime was committed. It is the duty of government to surrender up fugitives upon demand after the civil magistrate shall have ascertained the existence of reasonable grounds for the charge, and sufficient to put the accused upon his trial. The guilty cannot be tried and punished by any other jurisdiction than the one whose laws have been violated.

The only difficulty in the absence of positive agreement, consists in drawing the line between the class of offences to which the usage of nations does, and to which it does not apply, inasmuch as it is understood in practice, to apply only to crimes of great atrocity, or deeply affecting the public safety.

P. Voet. de statutis, p. 297, says, that the surrender of criminals is denied according to the usage of almost all Christian nations, except in cases of humanity. Some foreign jurists hold that crimes committed in one state, may, if the criminal be found in another state, be, upon demand, punished there.

11. Why are ambassadors allowed to form an exception to the general case of foreigners resident in the country?—38

By reason of their being the representatives of their sovereigns, and requisite for negotiations and friendly intercourse.

12. What if ambassadors insult, or openly attack the laws or government of the nation to whom they are sent?—38

Their functions may be suspended by a refusal to treat with them, or application can be made to their own sovereign for their recall, or they may be dismissed and required to depart within a reasonable time; and every government has a right to judge for itself, whether the language or conduct of a foreign minister is admissible. The writers on public law go still further, and allow force to be applied to confine or send away an

ambassador, when the safety of the state, which is superior to all other considerations, absolutely requires it. This is all that can be done, for ambassadors cannot, in any case, be made amenable to the civil or criminal jurisdiction of the country.

13. To what does the distinction, between ambassadors, ministers plenipotentiary, envoys extraordinary, and resident ministers, relate?—39

Only to diplomatic precedence and etiquette, and not to their essential powers and privileges.

14. May a government refuse to receive an ambassador or minister?—40

It may, and without affording any just cause of war, though the act would, probably, excite unfriendly dispositions, unless accompanied with conciliatory explanations.

15. How far is a government bound by an act of its minister?—40

This will depend upon the nature and terms of his authority. It is now the usual course for every government to reserve to itself the right to ratify or dissent from the treaty agreed to by its ambassador. A general letter of credence is the ordinary letter of attorney, or credential of the minister; and it is not understood to confer a power upon the minister to bind his sovereign conclusively.

16. What are consuls?—41

Commercial agents, appointed to reside in the seaports of foreign countries, with a commission to watch over the commercial rights and privileges of the nation deputing them.

17. At what time were consuls first appointed?—41

About the 12th century, in the opulent states of Italy, such as Pisa, Lucca, Genoa, and Venice.

18. Are nations bound to receive foreign consuls?—43

Not unless they have agreed to do so by treaty; and a refusal is no violation of the peace and amity between nations.

19. Are consuls considered as public ministers?—43

Not so as to be entitled to the privileges appertaining to that character, nor are they under the special protection of the law of nations.

LECTURE III.

OF THE DECLARATION AND OTHER EARLY MEASURES OF A STATE OF WAR.

1. What amounts to a just cause of war?—48

An injury, either done or threatened, to the perfect rights of a nation, or any of its members, and susceptible of no other redress. War is not to be resorted to without absolute necessity, nor unless peace would be more dangerous and more miserable than war itself.

2. What is the rule where one nation is bound by treaty to afford assistance, in a case of war between its ally and a third power?—49

The assistance is to be given whenever the *casus fœderis* occurs; but a question will sometimes arise whether the government which is to afford the aid, is to judge for itself of the justice of the war on the part of the ally; and to make the right to assistance depend upon its own judgment.

Grotius is of opinion, that treaties of that kind do not oblige us to participate in a war, which appears to be manifestly unjust on the part of the ally; and it is said to be a tacit condition annexed to every treaty made in peace, and stipulating to afford succours in war, that the stipulation is only to apply to a just war. To give assistance to an unjust war, on the ground of the treaty, would be contracting an obligation to do injustice, and no such contract is valid.

3. What if to grant the succour stipulated would expose the state granting to imminent danger?—50

A nation which has agreed to render assistance to another, is not obliged to furnish it when the case is hopeless. Such extreme cases are tacit exceptions to the obligation of the treaty; but the danger must not be slight, remote, or contingent, for this would be to seek a frivolous cause to violate a solemn engagement.

4. In what case is not the contract to furnish assistance in a defensive alliance, obligatory upon the parties?—50

The condition of the contract does not call for assistance unless the ally be engaged in a defensive war, for in a defensive alliance the nation engages only to defend its ally, in case he be attacked, and even then we are to inquire whether he be not justly attacked. The defensive alliance applies only to a war first commenced in point of fact against the ally; and the power that first declares, or actually begins the war, makes what is deemed, in the conventional law of nations, an offensive war.

5. With whom resides the right to declare war?—51

In ancient Greece and Italy, the right of declaring war resided with the people, who retained, in their collective capacity, the exercise of a large portion of sovereign power. Among the ancient Germans it belonged also to popular assemblies. But in the monarchies of Europe, which arose upon the ruins of the feudal system, this important prerogative was generally assumed by the king. Many publicists consider the power as a part of the sovereign authority of the state, of which the legislative department is an essential branch. There are, however, several exceptions to this general position; for in the limited monarchies of England, France, and Holland, the king alone declares war. In these United States the power to declare war is confided to the legislature of the Union.

6. What effect has a war, duly declared, upon the private citizens of the belligerent parties?—55

Every man is, in judgment of law, a party to the acts of his own government, and a war between the governments of two nations, is a war between all the individuals of the one, and all the individuals of which the other nation is composed. Government is the representative of the will of all the people, and acts for the whole society.

7. What is the rule as to the capture of enemy's property found within the territory upon the breaking out of war?—56

According to strict authority, a state has a right to deal as an enemy with persons and property so found within its power, and to confiscate the property, and to detain the persons as prisoners of war. No one, says Bynkershoeck, ever required that notice should be given to the subjects of the enemy to withdraw their property, or it would be forfeited. The practice of nations is to appropriate it at once, without notice, if there be no special convention to the contrary. But, though Bynkershoeck lays down this, as well as other rules of war, with great harshness and severity, he mentions several instances arising in the 17th, and one as early as the 15th century, of stipulations in treaties, allowing foreign subjects a reasonable time after a war breaks out, to recover and dispose of their effects, or to withdraw them. Such stipulations have now become an established formula in commercial treaties.

8. What is the effect of an embargo?—60

It is an implied declaration of war, though liable to be explained away and annulled by a subsequent accommodation between the nations. The seizure is at first an act equivocal as to the effect, though hostile in the mere execution, and if the matter in dispute terminates in reconciliation, the seizure becomes a mere civil embargo; but if it terminate otherwise, the subsequent hostilities have a retroactive effect, and render the embargo a hostile measure *ab initio*. The property detained is deemed enemy's property, and liable to condemnation.

9. In what case may letters of *marque* and *reprisal* be granted, according to the law of nations ?—61

When one nation has committed some direct or palpable injury to another, as by withholding a just debt, or by violence to persons or property, and has refused to give any satisfaction. The reprisals may be made in support of the rights of a subject as well as for those of the sovereign. The commission is not to be issued except in a case clearly just.

10. What is the law as to the right to confiscate debts, contracted by individuals in time of peace, and which remain due to subjects of the enemy at the declaration of war ?—62

In former times the right to confiscate debts was admitted as a doctrine of national law, and Grotius, Puffendorff and Bynkershoeck pronounced in favour of it. Down to the year 1737, the general opinion of jurists was in favour of the right ; but Vattel says, that a relaxation of the rigour of the rule has since taken place among the sovereigns of Europe. There has frequently been a stipulation in modern treaties, that debts should not be confiscated in the event of war. The treaties between the United States and Colombia in 1825, and Chili in 1832, contain such a provision ; but the treaty between the United States and Great Britain in 1795, went further, and contained the explicit declaration that it was "unjust and impolitic" that debts of individuals should be impaired by national differences.

11. What if property have been wrongfully taken by the state before the war, and be in the country at the opening of the war ?—65

Such property cannot be seized, but must be restored.

12. What is the rule as to trading with the enemy ?—66

That the declaration of war is an absolute interruption and interdiction of all commercial correspondence, intercourse, and dealing between subjects of the two countries. This is equally the doctrine of all the authoritative writers on the law of nations, and the maritime ordinances of the great powers of Europe, and the received law of this country.

13. What is the rule as to contracts made with the enemy ?—67

They are utterly void. The insurance of enemy's property is an illegal contract. The drawing of a bill of exchange by an alien enemy, on a subject of the adverse country, is an illegal contract. The remission of funds, in money or bills, to subjects of the enemy, is unlawful.

14. What are the rules governing ships of war and cartel ships ?—68

The same interdiction applies to them, and therefore all trade, by means of such vessels, is unlawful, without the consent of both governments concerned. It is equally illegal for an ally of one of the belligerents, and who carries on the war conjointly, to have any commerce with the

enemy. A single belligerent may grant licenses to trade with the enemy, and dilute and weaken his own rights at pleasure, but it is otherwise when allied nations are pursuing a common cause.

LECTURE IV.

OF THE VARIOUS KINDS OF PROPERTY LIABLE TO CAPTURE.

1. Into what two classes are alien enemies distinguished ?—72

Into permanent and temporary. A man is said to be permanently an alien enemy, when he owes a permanent allegiance to the adverse belligerent. But he who does not owe a permanent allegiance to the enemy, is an enemy only during the existence and continuance of certain circumstances. Possession of the soil impresses upon the owner the character of the country, so far as the products of the soil are concerned, wherever the local residence of the owner may be. The produce of a soil bears a hostile character for the purpose of capture, and is the subject of legitimate prize, when taken in the course of transportation to any other country.

2. What if a person have a settlement in a hostile country by the maintenance of a commercial establishment there ?—74

He will be considered a hostile character, and a subject of the enemy, in regard to his commercial transactions connccted with that establishment.

3. What facts are requisite to constitute a commercial domicil ?—76

It has been a question admitting of much discussion and difficulty, arising from the complicated character of commercial speculations. The *animus manendi* appears to have been the point to be settled. The presumption arising from actual residence in any place, is, that the party is *animo manendi*, and it lies upon him to remove the presumption. If the intention to establish a permanent residence be ascertained, the recency of the establishment, though it may have been for a day only, is immaterial.

4. What is the rule in Asia and Africa ?—77

An immiscible character is kept up, and Europeans trading under the protection of a factory, take the national character of the establishment under which they live and trade.

5. What if a person having his domicil in a neutral country, connects

himself with a house of trade in the enemy's country, in time of war, or continues, during war, a connexion formed in time of peace ?—80

He is considered as impressed with a hostile character, in reference to so much of his commerce as may be connected with that establishment. The rule is the same whether he maintains the establishment as a partner or a sole trader.

6. What if there be a partnership between two persons, the one residing in a neutral, and the other in a belligerent country ?—81

The trade of one of them, with the enemy, will be held lawful, and that of the other unlawful; and, consequently, the share of one partner in the joint traffic will be condemned, while the other will be restored.

7. What is the rule as regards the colonial trade of the enemy ?—81

That a special license, granted by a belligerent to a neutral vessel, to trade to her colony, in those branches of commerce which were before confined to native subjects, will warrant the presumption that such vessel is adopted and naturalized, or that such permission was granted in fraud of the belligerent right of capture, and the property so covered may reasonably be regarded as enemy's property.

8. What is the effect of sailing under the flag and pass of the enemy ? —85

The English rule is, to hold the ship bound by the character imposed upon it by the authority of the government from which all the documents issue. But goods which have no such dependence upon the authority of the state, may be differently considered; and if the cargo be laden in time of peace, though documented as foreign property, in the same manner as the ship, the sailing under a foreign flag and pass has not been held conclusive as to the cargo. The doctrine of the courts in this country has been very strict on this point, and it has been very frequently decided, that sailing under the license and passport of protection of the enemy, in furtherance of his views and interests was, without regard to the object of the voyage, or the port of destination, such an act of illegality as to subject both ship and cargo to confiscation as prize of war.

9. What is the law concerning property *in transitu ?*—86

That property which has a hostile character at the commencement of the voyage, cannot change that character by assignment while it is *in transitu*, so as to protect it from capture. During peace, a transfer *in transitu* may be made.

10. What if property be shipped from a neutral to an enemy's country, under a contract to become the property of the enemy upon arrival ?—86

It may be taken *in transitu* as enemy's property; for capture is considered as delivery.

LECTURE V.

OF THE RIGHTS OF BELLIGERENT NATIONS IN RELATION TO EACH OTHER.

1. What is the rule as to the right to plunder by land and sea?—91

There is a marked difference in the rights of war carried on by land and at sea. The object of a maritime war is the destruction of the enemy's commerce and navigation, in order to weaken and destroy the foundations of his naval power. The capture or destruction of private property is essential to that end; and it is allowed in maritime wars by the law and practice of nations. But there are a great many limitations imposed upon the operations of war by land, though depredations upon private property, and despoiling and plundering the enemy's territory are still too prevalent. Such conduct has been condemned in all ages by the wise and virtuous, and is usually severely punished by those commanders of disciplined troops, who have studied war as a science, and are animated by a sense of duty, or the love of fame. Vattel condemns very strongly the spoliation of a country without palpable necessity; and he speaks with a just indignation of the burning of the Palatinate by Turenne, under the cruel instructions of Louvois, the war minister of Louis XIV. The general usage now is, not to touch private property upon land, without making compensation, unless in special cases, dictated by the necessary operations of war, or when captured in places carried by storm, and which repelled all the overtures for a capitulation. Contributions are sometimes levied upon a conquered country, in lieu of confiscation of property, and as some indemnity for the expense of maintaining order and affording protection.

2. What is the law concerning retaliation?—93

That retaliation, to be just, ought to be confined to the guilty individuals who may have committed some enormous violation of public law.

3. When were commissions to cruise first held necessary?—95

It was not until the 15th century that subjects were forbidden to cruise against enemies without a license. Vessels are now fitted out and equipped by private adventurers at their own expense, to cruise against the common enemy. They are duly commissioned, and it is said not to be lawful to cruise without a regular commission.

4. What if vessels do cruise without a commission?—95

If they depredate upon the enemy without a commission, they act upon their peril, and are liable to be punished by their own sovereign; but the enemy are not warranted to consider them as criminals, and, as respects the enemy, they violate no right by capture.

5. How far are the owners and officers of private armed vessels liable in damages, for illegal conduct?—99

The rule is liable to the modifications of municipal regulations.—Bynkershoeck has discussed the question quite at large, and he concludes that the owner, master, and sureties, are jointly and severally liable, *in solido*, for the damages incurred. The French law of prize was formerly the same as the rule laid down by Bynkershoeck; yet the new commercial code of France exempts the owners of private armed vessels in time of war from responsibility for trespasses at sea, beyond the amount of the security they may have given, unless they were accomplices in the tort. The English statute, 7 Geo. II. c. 15, is to the same effect, in respect to embezzlements in the merchants' service. It limits the responsibility to the amount of the vessel and freight, but it does not apply to privateers in time of war, and where there is no positive local law on the subject, (and there is none with us,) the general principle is, that the liability is commensurate with the injury.

6. What is the law upon the subject of foreign commissions?—100

Vattel holds it to be inexcusable and base, for an individual to take a commission from a foreign prince, to prey upon the subjects of a state in amity with his native country. The laws of the United States have made ample provision on this subject, and they may be considered as in affirmance of the law of nations, and as prescribing specific punishment for acts which were before unlawful. An act of congress prohibits citizens to accept, within the jurisdiction of the United States, a commission, or for any person, not transiently within the United States, to consent to be retained, or enlisted, to serve a foreign state in war against a government in amity with us. It likewise prohibits American citizens from being concerned, without the limits of the United States, in fitting out, or otherwise assisting, any private vessel of war, to cruise against the subjects of friendly powers.

7. What if a vessel have a commission from two different powers?—100

The better opinion is, that she is liable to be treated as a pirate; for though the two powers may be allies, yet one of them may be in amity with a state with whom the other is at war.

8. What is the law governing prizes?—101

That the right to all captures vests primarily in the sovereign, and no individual can have any interest in a prize, whether made by a public or private armed vessel, but what he receives under the grant of the state. But the general practice under the laws and ordinances of belligerent governments, is, to distribute the proceeds of captured property, when duly passed upon, and condemned as prize, (and whether captured by public or private commissioned vessels) among the captors, as a reward for bravery, and to stimulate exertion.

9. By what means only, can prizes taken at sea, become vested in the captors ?—102

By judicial inquiry; and the present enlightened practice of the commercial nations, has subjected all such captures to the scrutiny of judicial tribunals, as the only sure way to furnish due proof that the seizure was lawful. The property is not changed in favour of a neutral vendee, or re-captor, so as to bar the original owner, until a regular sentence of condemnation has been pronounced by some court of competent jurisdiction, belonging to the sovereign of the captor; and the purchaser must be able to show documentary evidence of the fact, to support his title.

10. May the prize court of the captor sit in the territory of an ally ?—103

It may not. Neutral ports are not intended to be auxiliary to the operations of the powers at war, and the law of nations has clearly ordained that a prize court of a belligerent captor cannot exercise jurisdiction in a neutral country.

11. May a prize court exercise jurisdiction over prizes lying in a neutral port ?—104

It may.

12. How do the prize courts consider a ransom bill ?—104

As a war contract, protected by good faith and the law of nations; and notwithstanding that the contract is considered in England as tending to relax the energy of war, and deprive cruisers of the chance of re-capture, it is in many views highly reasonable and humane. Other maritime nations regard ransoms as binding, and to be classed among the few legitimate *commercia belli*. They have never been prohibited in this country.

13. What is the effect of a ransom ?—105

It is equivalent to a safe conduct granted by the authority of the state to which the captor belongs, and it binds the commanders of other cruisers to respect the safe conduct thus given. The safe conduct implied in the ransom bills, requires that the vessel should be found within the course prescribed, and within the time limited by the contract, unless forced out of her course by stress of weather, or unavoidable necessity.

14. What if the ransomed vessel perishes by a peril of the sea, before arrival in port ?—105

The ransom is, nevertheless, due, for the captor has not insured the prize against the perils of the sea, but only against re-capture by cruisers of his own nation, or the allies of his country.

15. What was the *jus postliminii* of the Romans ?—108

It was a fiction of law by which persons or things taken from the enemy, were restored again to their former state, upon coming again un-

der the power of the nation to which they formerly belonged. It is a right recognised by the law of nations, and contributes essentially to mitigate the calamities of war.

16. What if a captor bring his prisoners into a neutral port?—109

He may, perhaps, confine them on board his ship, as being by fiction of law part of the territory of his sovereign, but he has no control over them on shore.

LECTURE VI.

OF THE GENERAL RIGHTS AND DUTIES OF NEUTRAL NATIONS.

1. What are the chief rights and duties of neutrals?—115

They shall be permitted to carry on their accustomed trade, under a few necessary restrictions. They are to furnish no aids to one party, which they are not equally ready to furnish to the other; even a loan of money to one of the belligerent parties, is considered, to be a violation of neutrality. But the neutral duty does not extend so far as to prohibit the fulfilment of antecedent engagements. But if a neutral power be under a contract to furnish succours to one party, he is said not to be bound, if his ally was the aggressor; and in this solitary instance the neutral may examine into the merits of the war, so far as to see whether the *casus fœderis* exists. A neutral has a right to pursue his ordinary commerce, and may become the carrier of the enemies' goods, without being subject to any confiscation of the ship, or of the neutral articles on board; though not without the risk of having the voyage interrupted by the seizure of the hostile property.

2. What if neutral property be found in the vessels of the enemy?—117

It is inviolable. But the general inviolability of the neutral character goes farther than merely the protection of neutral property. It protects the property of the belligerents when within the neutral jurisdiction.

3. What if the enemy be attacked, or any capture made under neutral protection?—117

The neutral is bound to redress the injury, and effect restitution.—The books are full of cases recognising this principle of neutrality. No act of hostility is to be commenced on neutral ground.

4. What if a belligerent cruiser inoffensively passes over a portion of water lying within the neutral jurisdiction?—119

That fact is not usually considered such a violation of the territory as to effect and invalidate a capture made beyond it. It has been held, in this country, that foreign ships, offending against our laws, within our jurisdiction, may be pursued and seized upon the ocean, and rightfully brought into our ports for adjudication.

5. What were the rules of neutrality established by congress in 1793? —122

That the original arming or equipping of vessels in our ports, by any of the powers at war, for military service, was unlawful, and no such vessel was entitled to an asylum in our ports. The equipment by them of government vessels of war, in matters which, if done to other vessels, would be applicable either to commerce or war, was lawful. The equipment by them of vessels fitted for merchandise and war, and applicable to either, was lawful; but if it were of a nature solely applicable to war, it was unlawful. And if the armed vessel of one nation should depart from our jurisdiction, no armed vessel being within the same, and belonging to an adverse belligerent power, should depart until twenty-four hours after the former, without being deemed to have violated the law of nations.

6. What are the principal provisions made by congress on the subject of neutrality?—123

It is declared to be a misdemeanor for any citizen of the United States, within the territory or jurisdiction thereof, to accept and exercise a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district, or people, with whom the United States are at peace; or for any person, except a subject or citizen of any foreign prince, state, colony, district, or people, transiently within the United States, on board of any foreign armed vessel, within the territory or jurisdiction of the United States, to enlist or enter himself, or hire or retain another person to enlist or enter himself, or go beyond the limits of the United States, with intent to be enlisted or entered in the service of any foreign prince, state, colony, district or people, as a soldier, mariner or seaman; or to fit out and arm, or to increase or augment the force of any armed vessel, with intent that such vessel be employed in the service of any foreign power at war with another power, with whom we are at peace; or to begin, or set on foot, provide, or prepare the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince, or state, or of any colony, district, or people, with whom we are at peace; or to hire or enlist troops or seamen, for foreign military or naval service; or to be concerned in fitting out any vessels to cruise or commit hostilities in foreign service, against a nation at peace with us; and the vessel in the latter case is made subject to forfeiture. It has been decided, that captures made by a vessel so illegally fitted out, whether a public or private armed ship, were torts, and that the original owner was entitled to restitution, if

the property was brought within our jurisdiction; but that an illegal outfit did not affect a capture made after the cruise to which the outfit had been applied, had terminated.

7. What is the rule as to carrying prizes into neutral ports for sale? —123

That a belligerent cruiser may, consistently with a state of neutrality, until prohibited by the neutral power, bring her prize into a neutral port, and sell it.

8. What if enemy's property be found on board of neutral ships?—124

It is not protected, if the neutral vessel be beyond the neutral jurisdiction. It was formerly a question whether the neutral ship conveying enemy's property, was not liable to confiscation for that cause. This was the old law of France, in cases in which the master of the vessel knowingly took on board the enemy's property; but Bynkershoeck truly observes, that the master's knowledge is immaterial in the case, and that the rule in the Roman law, making the vessel liable for the fraudulent act of the master, was merely a fiscal regulation, and did not apply; and for the neutral to carry enemy's goods, is not unlawful.

9. What is the rule if neutral property be found on board of enemy's ships?—128

It is to be restored without any compensation for the detention and other necessary inconveniences attending the capture. A neutral flag constitutes no protection to enemy's property, and a belligerent flag communicates no hostile character to neutral property.

10. Is the captor of the enemy's vessel entitled to freight from the owner of neutral goods found on board, and restored?—131

Under certain circumstances, the captor has been considered to be entitled to freight, even though the goods were carried to the claimant's own country and restored; and he clearly is entitled to freight, if he performs the voyage, and carries the goods to the port of destination.

11. Is neutral property on board of an armed belligerent vessel, protected by its neutral character?—132

In this country the Supreme Court has decided that it is. In England the High Court of Admiralty has made a contrary decision.

LECTURE VII.

OF RESTRICTIONS UPON NEUTRAL TRADE.

1. What are the principal restrictions imposed by the law of nations upon the trade of neutrals?—135

The prohibition to furnish the belligerent parties with warlike stores, and other articles which are directly auxiliary to warlike purposes. Such goods are denominated contraband of war, but in the attempt to define them the authorities vary, or are deficient in precision, and the subject has long been a fruitful source of dispute between neutral and belligerent nations.

2. How does Grotius define contraband of war?—135

He distinguishes between things which are useful only in war, as arms and ammunition, and things which serve merely for pleasure, and things which are of a mixed nature, and useful both in peace and war.—He agrees with other writers in prohibiting neutrals from carrying articles of the first kind to an enemy, as well as permitting the second kind to be carried. As to articles of the third class, which are of indiscriminate use in peace and war, such as money, provisions, ships, and naval stores, he says they are sometimes lawful articles of neutral commerce, and sometimes not. They would be contraband if carried to a besieged town, camp or port.

3. How do writers in general define contraband of war?—136

In a naval war it is admitted, that ships become contraband, and horses and saddles may be included. Vattel speaks with some want of precision, and only says in general terms: that commodities particularly used in war are contraband, such as arms, military and naval stores, timber, horses, and even provisions, in certain junctures, when there are hopes of reducing the enemy by famine. Locenius and some other authorities referred to by Valin, consider provisions as generally contraband; but Valin and Pothier insist that they are not so, either by the law of France, or by the common law of nations, unless carried to besieged or blockaded places. The marine ordinance of Louis XIV. included horses and their equipage, transported for military service. They are included in the restricted list of contraband articles mentioned in the treaty between theUnited States and Colombia in 1825. Valin, says, that naval stores have been regarded as contraband from the beginning of the last century, and the English prize law is very explicit on this point. Naval stores, and materials for ship building, and even corn, grain, and victuals of all sorts going to the dominions of the enemy were declared contraband by an ordinance of Charles I. in 1626. Sail-cloth is now held to be uni-

versally contraband, even on a destination to ports of mere mercantile naval equipment; and in the case of the *Maria*, it was held that tar, pitch, and hemp, and whatever materials went to the construction and equipment of vessels of war, were contraband by the modern law of nations. The executive government of this country has frequently conceded, that materials for the building, equipment, and armament of ships of war, as timber and naval stores, were contraband. But it does not seem that timber is, *in se*, in all cases to be considered a contraband article, though destined to an enemy's port.

The modern established rule is, that provisions are not generally contraband, but may become so, under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it.

4. What are the principal circumstances which tend to preserve provisions from being liable to be treated as contraband?—139

One is, that they are the growth of the country which produces them. Another circumstance to which some indulgence is shown by the practice of nations, is, when the articles are in their native and unmanufactured state. Thus, iron is treated with indulgence, though anchors and other instruments fabricated out of it, are directly contraband. Hemp is more favourably considered than cordage, and wheat is not considered as so noxious a commodity, when going to an enemy's country, as any of its final preparations for human use. The most important distinction, is whether the articles were intended for the ordinary use of life, or even for mercantile ships' use, or whether they were going with a highly probable destination to military use.

5. What if part of a cargo be contraband, and part neutral?—143

The contraband articles are said to be of an infectious nature, and they contaminate the whole cargo belonging to the same owners. The innocence of any particular article is not usually admitted to exempt it from the general confiscation.

6. What is the law concerning blockades?—144

That neutrals forfeit the immunities of their national character by violations of blockade; and among the rights of belligerents, there is none more clear and uncontrovertible, or more just and necessary in the application, than that which gives rise to the law of blockade. Bynkershoeck says, it is founded on the principles of natural reason, as well as upon the usage of nations; and Grotius considers the carrying of supplies to a besieged town, or blockaded port, as an offence exceedingly aggravated and injurious. They both agree that a neutral may be dealt with severely; and Vattel says, he may be treated as an enemy. The law of blockade is, however, so harsh and severe in its operation, that, in order to apply it, the fact of the actual blockade must be established by clear and unequivocal evidence, and the neutral must have had due previous notice of it; and the squadron allotted for the purpose of its execution, must be competent to cut off all communication with the interdicted place or port; and

the neutral must have been guilty of some violation, either by going in, or attempting to enter, or by coming out with a cargo, laden after the commencement of the blockade.

A blockade must be existing in point of fact; and in order to constitute that existence, there must be a power present to enforce it. The definition of a blockade given by the convention of the Baltic powers in 1780, and again in 1801, and by the ordinance in congress in 1781, required that there should be actually a number of vessels stationed near enough to the port to make the entry apparently dangerous.

7. What if the blockading squadron be occasionally absent?—145

If the absence be produced by accident, as in the case of a storm, and when the station is resumed with due diligence, it does not suspend the blockade, provided the suspension, and the reason of it, be known; and the law considers an attempt to take advantage of such an accidental removal, as an attempt to break the blockade, and a mere fraud.

8. In what way may notice of blockade be communicated?—147

Either actually by a formal notice from the blockading power; or constructively by notice to his government, or by the notoriety of the fact. It is immaterial in what way the neutral comes to the knowledge of the blockade. If the blockade actually exists, and he has knowledge of it, he is bound not to violate it.

9. What is the effect of notice to a foreign government?—147

It is a notice to all the individuals of that nation, and they are not permitted to aver ignorance of it, because it is the duty of the neutral government to communicate the notice to their people.

10. What is the difference of a blockade regularly notified, and one without such notice?—147

In the former case, the act of sailing for the blockaded place, with an intent to evade it, or to enter contingently, amounts, from the very commencement of the voyage, to a breach of the blockade, for the port is to be considered as closed up, until the blockade be formally revoked, or actually raised; whereas in the latter case of a blockade *de facto*, the ignorance of the party, as to its continuance, may be received as an excuse for sailing to the blockaded place, on a doubtful and provisional destination.

12. What is the consequence of a breach of blockade?—151

The confiscation of the ship and goods. If a ship has contracted guilt by a breach of blockade, the offence is not discharged until the end of the voyage. The penalty never travels on with the vessel further than to the end of the voyage; and if she is taken in any part of that voyage, she is taken *in delicto*. The penalty for a breach of blockade is also held to be remitted, if the blockade had been raised before the capture.

12. What is the law upon the subject of carrying enemy's despatches? —152

That it is an act of illegal assistance afforded to the enemy. The carrying two or three cargoes of stores, is necessarily an assistance of a limited nature; but in the transmission of despatches may be conveyed the entire plan of a campaign, and it may lead to a defeat of all the projects of the other belligerent in that theatre of the war. The appropriate remedy for this offence, is the confiscation of the ship; and if any privity subsists between the owners of the cargo and the master, they are involved by implication in his delinquency. If the cargo be the property of the proprietors of the ship, then, by the general rule, *ob continentiam delicti*, the cargo shares the same fate.

13. What is the law of nations upon the belligerent right to visitation and search of neutral merchant ships?—153

In order to enforce the rights of belligerent nations against the delinquencies of neutrals, and to ascertain the real, as well as the assumed character of all vessels upon the high seas, the law of nations gives them the practical power of visitation and search. It is founded on necessity, and is strictly a war right, and does not exist in time of peace. If upon making the search, the vessel be found employed in contraband trade, or in carrying enemy's despatches, she is liable to be taken and brought in for adjudication, before a prize court.

14. What if the neutral resists this right?—154

The penalty for the violent contravention of this right, is the confiscation of the property so withheld from visitation. Upon this principle, a fleet of Swedish merchant ships, sailing under convoy of a Swedish man-of-war, and under the instructions of the Swedish government to resist, by force, the right claimed by the British lawfully commissioned cruisers, was condemned. The resistance of the convoying ship was a resistance of the whole convoy. The doctrine of the British admiralty on the right of visitation and search, and on the limitation of the right, has been recognised in its fullest extent by the courts of justice in this country.

15. What is the rule as to neutral documents?—157

That a neutral is bound not only to submit to search, but to have his vessel duly furnished with genuine documents requisite to support her neutral character. The most material of these documents are, the register, passport, sea letter, muster roll, log book, charter party, invoice, and bill of lading.

16. What if a ship conceals her papers?—157

It will justify a capture, and carrying into port for adjudication, though it does not absolutely require a condemnation. The spoliation of papers is a still more aggravated and inflamed circumstance of suspicion. That fact may exclude further proof, and be sufficient to infer guilt; but it

does not in England, as it does by the maritime laws of other countries, create an absolute presumption *juris et de jure*. The supreme court of the United States have followed the less rigorous English rule, and held that spoliation of papers was not, of itself, sufficient ground for condemnation.

LECTURE VIII.

OF TRUCES, PASSPORTS, AND TREATIES OF PEACE.

1. What is the effect of a truce?—159

It does not terminate the war, but it is one of the *commercia belli* which suspends its operations. A particular truce is only a partial cessation of hostilities, as between a town and an army besieging it. But a general truce applies to the operations of the war, and, if it be for a long or indefinite period of time, it amounts to a temporary peace.

2. By whom may a truce be made?—159

A partial truce may be made by a subordinate commander, and it is a power necessarily implied in his trust; but it is requisite to a general truce, or suspension of hostilities throughout the nation, or for a great length of time, that it be made by the sovereign of the country, or by his special authority. The general principle on the subject is, that if a commander makes a compact with the enemy, and it be of such a nature that the power to make it could be reasonably implied from the nature of the trust, it would be valid and binding, though he abused his trust. A truce binds the contracting parties from the time it is concluded, but it does not bind the individuals of the nation so as to render them personally responsible for a breach of it, until they have had actual or constructive notice of it.

3. What are the rights of the parties under the truce?—160

Each party may do, within his own territories, whatever he would have a right to do in time of peace. He may continue active preparations for war, by repairing fortifications, levying or disciplining troops, and collecting provisions, and articles of war. But in the case of a truce between the governor of a fortified town, and the army besieging it, neither party is at liberty to continue the works, constructed either for attack or defence, and which could not safely be done if hostilities had continued. The meaning of every such compact is, that all things should remain as they were in the places contested, and of which the possession was disputed at the moment of the conclusion of the truce.

At the expiration of the truce, hostilities may recommence without any fresh declaration of war; but if it be for an indefinite time, justice and good faith would require due notice of an intention to terminate it.

4. What is a passport?—162

It is a privilege granted in war, and exempting the party from the effect of its operations, during the time, and to the extent prescribed in the permission.

5. Who may grant passports?—162

They flow from the sovereign authority; but the power may be delegated by the sovereign to persons in subordinate command, and they are vested with that power, either by an express commission, or by the nature of their trust. The general of an army, from the very nature of his power, can grant safe conducts; but the permission is not transferable by the person named in the passport.

6. What is the effect of a license to trade, given by the enemy to the subjects of the adverse party?—163

It is the resumption of a state of peace to the extent of the license. In the country which grants them, licenses to carry on a pacific commerce are *stricti juris*, as being exceptions to the general rule; though they are not to be construed with pedantic accuracy, nor will every small deviation be held to vitiate the fair effect of them.

7. What is the effect given to treaties of peace?—165

When made by the competent power, they are obligatory upon the whole nation. If the treaty requires the payment of money to carry it into effect, and the money cannot be raised but by an act of the legislature, the treaty is morally obligatory upon the legislature to pass the law, and to refuse it would be a breach of public faith. The department of the government that is intrusted with the treaty-making power, is competent to bind the national faith in its discretion; for the power to make treaties of peace must be co-extensive with the exigencies of the nation. All treaties made by that power become of absolute efficacy, because they are the supreme law of the land.

8. What is the rule as to the right to alienate the public domain by treaty?—166

There can be no doubt that the power competent to bind the nation by treaty may alienate the public domain and property by treaty. A power to make treaties of peace necessarily implies a power to decide the terms upon which they shall be made, and foreign states could not deal safely with the government upon any other presumption. The power that is intrusted generally and largely with the authority to make valid treaties of peace, can of course bind the nation by alienation of part of its territory; and this is equally the case, whether that territory be already in the occupation

of the enemy, or remains in the possession of the nation, and whether the property be public or private.

"Vattel admits that the fundamental laws of a nation may withhold the power of alienation by treaty; and it would seem, by necessary inference, to be a violation of fundamental law, for the treaty-making power, acting under such an instrument as the constitution of the United States, to agree by treaty for the abolition or alteration of any part of it. The stipulation would go to destroy the very authority for making the treaty."

9. What is the rule as regards allies?—167

That the principal party in whose name the war is made, cannot justly make peace without including those defensive allies in the pacification who have afforded assistance, though they may not have acted as principals. The ally is, however, to be no further a party to the stipulations and obligations of the treaty, than he has been willing to consent. All that the principal can require, is, that the ally be restored to a state of peace.

The effect of peace is to put an end to the war, and to abolish the subject of it. Peace relates to the war which it terminates. It is an agreement to waive all discussion concerning the respective rights of the parties, and to bury in oblivion all the original causes of the war. It forbids the revival of the same war, by taking up arms for the cause which at first kindled it, though it is no objection to subsequent pretensions to the same thing on other foundations.

10. At what time do treaties usually take effect?—169

They bind the contracting parties from the moment of their conclusion, and that is understood to be from the day on which they are signed.

11. How far are treaties obligatory upon the parties?—174

Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals; and they are to receive a fair and liberal construction, and to be kept with the most scrupulous faith.

12. What is the distinction made by writers on public law, between a new war, for new cause, and a breach of a treaty of peace?—175

In the former case the rights acquired by the treaty subsist, notwithstanding the new war; but in the latter case they are annulled by the breach of the treaty of peace upon which they are founded.

13. What is the effect of a violation of one article of a treaty?—175

It is a violation of the whole treaty.

LECTURE IX.

OF OFFENCES AGAINST THE LAW OF NATIONS.

1. What are the principal offences against the law of nations ?—182

The violation of safe conducts, infringements of the rights of ambassadors, and piracy. To these we may add the slave trade, which may now be considered, not indeed as a piratical trade, absolutely unlawful by the law of nations, but as a trade condemned by the general principles of justice and humanity, openly professed and declared by the powers of Europe.

2. What is the statute law of the United States upon the violation of safe conducts ?—182

That if any person shall violate any safe conduct or passport, granted under the authority of the United States, he shall, upon conviction, be imprisoned not exceeding three years, and fined at the discretion of the court. The same punishment is inflicted upon those persons who infringe the law of nations, by offering violence to ambassadors, and other public ministers, or by being concerned in prosecuting or arresting them.

3. What is piracy ?—183

It is robbery, or a forcible depredation upon the high seas, without lawful authority, and done *animo furandi*, and in the spirit and intention of universal hostility.

4. How are pirates every where punished ?—184

They are every where pursued and punished with death.

5. What is the rule as to the right to pursue and take them ?—184

That every nation has a right to attack and exterminate them without any previous declaration of war; for though pirates may form a loose and temporary association among themselves, and re-establish in some degree those laws of justice which they had violated with the rest of the world, yet they are not considered as a national body, or entitled to the laws of war, as one of the community of nations. They acquire no rights by conquest, and the law of nations and the municipal laws of every country authorize the true owner to reclaim his property taken by pirates, wherever it may be found; and they do not recognise any title to be derived from an act of piracy.

6. What acts have the laws of the United States declared to be piracy? —185

Murder or robbery committed on the high seas, or in any river, haven, or bay, out of the jurisdiction of any particular state, or any other offence, which if committed within the body of a county, would, by the laws of the United States be punishable with death, shall be adjudged piracy and felony, and punishable with death. It was further declared that if any captain or mariner should piratically and feloniously run away with any vessel, or any goods or merchandise to the value of fifty dollars; or should yield up any such vessel voluntarily to pirates; or if any seaman should forcibly hinder his commander from defending the ship or goods committed to his trust, or should make a revolt in the ship; every such offender should be adjudged a pirate and felon, and punishable with death. Accessaries to such piracies before the fact, are punishable in like manner. If any person engaged in any piratical enterprise, or belonging to the crew of any piratical vessel, should land and commit robbery on shore, such an offender shall also be adjudged a pirate.

7. What is the law as to the right of jurisdiction in cases of piracy? —186

That it is of no importance for the purpose of giving jurisdiction, on whom or where a piratical offence has been committed. A pirate who is one by the law of nations, may be tried and punished in any country where he may be found.

8. What would be the effect of a plea of *autrefois acquit*, resting on a prosecution in any civilized state?—188

It would be a good plea in any other civilized state.

9. What if an alien, under a national commission, commit an act of piracy in pursuance of his authority?—188

His acts may be hostile, and his nation responsible for them. They may amount to a lawful cause of war, but they are never regarded as piracy.

10. What penalties have the United States prescribed against the importation or exportation of slaves for traffic?—194

The act of May, 1820, declared, that if any citizen of the United States, being of the crew of a foreign vessel, engaged in the slave trade, or any person whatever, being of the crew of any vessel armed in whole or in part, or navigated for, or on behalf of any citizen of the United States, should land on any foreign shore, and seize any negro or mulatto, with intent to make him a slave, or should decoy, or forcibly bring, or receive such negro on board of such vessel, with like intent; or should forcibly confine or detain on board, any negro or mulatto not lawfully held to service, with intent to make him a slave, or should, on the high seas, or on any tide water, transfer or deliver to any other vessel, any such negro or mulatto, with intent to make him a slave, or should deliver on shore, from on board any such vessel, any negro or mulatto with like intent, such citizen or person should be adjudged a pirate, and upon conviction, suffer death.

LECTURE X.

OF THE HISTORY OF THE AMERICAN UNION.

1. For what purpose was the government of the United States erected? —201

It was erected by the free voice and joint will of the people of America for their common defence and general welfare.

2. To what do its powers apply?—201

They apply to those great interests which relate to this country in its national capacity, and which depend, for stability and protection, on the consolidation of the Union. It is clothed with the principal attributes of political sovereignty, and is justly deemed the guardian of our best rights, the source of our highest civil and political duties, and the sure means of national greatness.

LECTURE XI.

OF CONGRESS.

1. Of what does Congress consist?—222

Of a senate and house of representatives.

2. What was the chief object of a separation of the legislature into two houses acting separately, and with co-ordinate powers?—222

To destroy the evil effects of sudden and strong excitement, and of precipitate measures springing from passion, caprice, prejudice, party intrigue, and personal influence, which have been found by sad experience to exercise a potent and dangerous sway in single assemblies.

3. How is the senate of the United States formed?—224

It is composed of two senators from each state, chosen by the legislature thereof, for six years, and each senator has one vote.

4. How are vacancies, occurring from death or otherwise, filled?—225

If they happen during the recess of the legislature of any state, the executive thereof may make temporary appointments, until the next meeting of the legislature, which shall fill the vacancies. The vice-president of the United States is president of the senate, but has no vote, unless they be equally divided.

5. What qualifications are requisite in a senator ?—228

The constitution requires that each senator shall be thirty years of age, and nine years a citizen of the United States, and at the time of his election, an inhabitant of the state for which he is chosen.

6. How is the house of representatives formed ?—228

It is composed of members chosen every second year by the people of the several states, who are qualified to vote for the most numerous branch of the legislature of the state to which they belong.

7. What are the necessary qualifications of a representative ?—228

That he hath attained the age of twenty-five years, and hath been seven years a citizen of the United States, and is, at the time of his election, an inhabitant of the state in which he is chosen.

8. How are the representatives apportioned among the states ?—230

According to the number of free persons, including those who are bound for years, and excluding Indians not taxed, and three-fifths of all other persons. The number of representatives cannot exceed one for every thirty thousand, but each state is entitled to one representative.

9. What are the powers of territorial delegates ?—230

They have a right to debate, but not to vote.

10. What are the privileges of the two houses of congress ?—234

Each house is made the sole judge of the election returns and qualifications of its members. A majority of each house constitutes a quorum to do business, but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner, and under such penalties as each house may provide. Each house likewise determines the rules of its proceedings, and can punish its members for disorderly behaviour; and with a concurrence of two-thirds expel a member. Each house is likewise bound to keep a journal of its own proceedings, and from time to time publish such parts as do not require secrecy, and to enter the ayes and nays on the journal, on any question when desired by one-fifth of the members present. The members of both houses are likewise privileged from arrest during their attendance on congress, and in going to and returning from the same, except in cases of treason, felony, and breach of the peace. No member can be questioned out of the house for any speech or debate therein. There is no power expressly given to either

house of congress to punish for contempts, except when committed by their own members, but the supreme court decided in the case of Anderson, that they had the power to commit for contempt, and that it was an implied power, and of vital importance to the safety, character and dignity of the house.

LECTURE XII.

OF JUDICIAL CONSTRUCTIONS OF THE POWERS OF CONGRESS.

1. What are the judicial constructions put upon the acts of congress giving to the United States a right to priority of payment over all private creditors, in cases of insolvency, and in the distribution of the estates of deceased debtors ?—244

In *Fisher* v. *Blight*, (2 *Cranch*, 358,) the supreme court decided, that the acts of congress, giving that general priority to the United States, were constitutional. It was a power founded on the authority to make all laws which should be necessary and proper to carry into effect the powers vested by the constitution in the government of the United States. The government is to pay the debts of the Union, and must be authorized to use the means most eligible to effect that object. It has a right to make remittances by bills or otherwise, and to take those precautions which will render these transactions safe. The principle settled, was that the United States are entitled to secure to themselves the exclusive privilege of being preferred as creditors to private citizens, and even to the state authorities. In the *United States* v. *Hooe*, (3 *Cranch*, 73,) it was held, that the priority to which the United States were entitled, did not partake of the character of a lien on the property of public debtors. A *bona fide* conveyance of part of the property of the debtor, not for the fraudulent purpose of evading the law, but to secure a fair creditor, is not a case within the act of congress.

Afterwards, in *Harrison* v. *Sterry*, (5 *Cranch*, 289,) it was held, that in the distribution of a bankrupt's effects, the United States were entitled to their preference, although the debt was contracted by a foreigner in a foreign country, and the United States had proved their debt under a commission of bankruptcy. Though the law of the place where the contract is made, be, generally speaking, the law of the contract, yet the right of priority forms no part of the contract. The insolvency which was to entitle the United States to a preference, was declared, in *Prince* v. *Bartlett*, (8 *Cranch*, 431,) to mean a legal and known insolvency, manifested by some notorious act, according to law. A private creditor acquires a

lien by attachment, which cannot be divested by process subsequently issued on the part of the United States. Nor will the lien of a judgment creditor, be displaced by the mere priority of the United States. The word insolvency, in the acts of congress, means a legal insolvency, and a a mere state of insolvency, or inability in a debtor to pay all his debts, gives no right of preference to the United States.

2. In what four cases, according to the preceding decisions, will the United States be entitled to a preference as creditors?—247

1. In the case of the death of the debtor without sufficient assets; 2. bankruptcy, or legal insolvency, manifested by some act pursuant to law; 3. a voluntary assignment by the insolvent of all his property, to pay his debts; 4. in the case of an absent, concealed, or absconding debtor whose effects are attached.

3. What is the law as to the fiscal lien of the United States?—248

It was held, in *Harris* v. *Dennie*, (3 *Pet. U. S. Rep.* 292,) that the government had a lien on goods imported, for the payment of duties accruing on them, and not secured by bond; and that the United States were entitled to the custody of the goods until the duties were paid or secured, and any attachment of the goods under state process, during the custody, was void. On the other hand, it was decided, that the government had no general lien on the goods of the importer held for duties due by him for other importations.

4. What is the judicial construction upon the act of Congress creating a bank?—254

That the law creating the bank of the United States, was one made in pursuance of the constitution; and that the branches of the national bank, proceeding from the same stock, and being conducive to the complete accomplishment of the object, were equally constitutional. The supreme court was afterwards led, in some degree, to review this decision, in the case of *Osborn* v. *The United States Bank*, (9 *Wheaton*, 859,) and they there admitted that congress could not create a corporation for its own sake, or for private purposes. The whole opinion, in the case of *M'Culloch* v. *The State of Maryland*, was founded on, and sustained by, the idea, that the bank was an instrument which was necessary and proper for carrying on the government. It was created for a national purpose only, though it was undoubtedly capable of transacting private as well as public business.

5. What is the construction of the powers of congress relative to taxation?—256

It was decided in *Loughborough* v. *Blake*, (5 *Wheaton*, 317,) that the power to tax extended equally to all places over which the government extended. But the court held, that congress are not bound, though they may, in their discretion, extend a direct tax to all the territories as well as

to the states. A direct tax, if laid at all, must be laid on every state conformably to the census, and therefore congress has no power to exempt any state from its due share of the burthen. But it is understood that congress are under no necessity of extending a tax to the unrepresented District of Columbia, and the territories; though, if they be taxed, then the constitution gives the rule of assessment.

6. What is the rule as to the national right of domain?—257

That congress have the exclusive right of pre-emption to all Indian lands lying within the territories of the United States. The Indians have the right of occupancy, and the United States possess the legal title, subject to that occupancy, and with an absolute right to extinguish the Indian title of occupancy either by conquest or purchase.

7. Upon what was the title of the European nations, which passed to the United States, founded?—258

Discovery, and conquest; and, by the European customary law of nations, prior discovery gave this title to the soil, subject to the possessory right of the natives. The principle is, that the Indians are to be considered merely as occupants, to be protected while in peace in the possession of their lands, but to be deemed incapable of transferring the absolute title to any other than the sovereign of the country.

8. What is the effect given to public records?—260

In pursuance of the constitution of the United States, congress by the act of May 26, 1790, provided the mode by which records and judicial proceedings should be authenticated, and then declared, that they should have such faith and credit given to them in every court within the United States, as they had by law or usage in the courts of the state from whence the records were taken. Under this act it was decided, in the case of *Mills* v. *Duryee*, (7 *Cranch*, 481,) that if a judgment, duly authenticated, had, in the state court from whence it was taken, the faith and credit of the highest nature, viz. record evidence, it must have the same faith and credit in every other court. A judgment is, therefore, conclusive in every other state, if a court of the particular state where it was rendered, would hold it conclusive.

9. What is the law respecting the militia?—261

That congress have authority to provide for calling forth the militia to execute the laws of the Union, to suppress insurrections, and to repel invasions; and to provide for organizing and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; reserving to the states, respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by congress. The president of the United States is the commander of the militia, when called into actual service.

10. What was the decision in the case of *Martin* v. *Mott*, (12 *Wheaton*, 19,) in 1827?—265

In that case it was decided and settled by the supreme court of the United States, that it belonged exclusively to the president to judge when the exigency arises, in which he had authority under the constitution to call forth the militia, and that his discretion was conclusive upon the subject.

LECTURE XIII.

OF THE PRESIDENT.

1. What personal qualifications must the president possess?—273

The constitution requires that he should be a natural born citizen of the United States, or a citizen at the time of the adoption of the constitution, and that he have attained the age of thirty-five years, and have been fourteen years a resident within the United States.

2. In what manner is the president appointed?—275

The constitution has confided the power of electing the president to a small body of electors, appointed in each state, under the direction of the legislature. It has declared that congress may determine the time of choosing the electors, and the day on which they shall vote, and that the day of election shall be the same in every state. It has also declared that the number of electors in each state shall be equal to the whole number of senators and representatives which the state is entitled to send to congress. The electors meet in their respective states, at a place appointed by the legislature thereof, on the first Wednesday in December, in every fourth year succeeding the last election, and vote by ballot for president and vice-president. They name in their ballots the person voted for as president, and, in distinct ballots, the person voted for as vice-president; and they make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which lists they sign, and certify and transmit, sealed, to the seat of government of the United States, directed to the president of the senate. The votes must be delivered to the president of the senate before the first Wednesday of January next ensuing the day of election. The president of the senate, on the second Wednesday of February succeeding every meeting of the electors, in the presence of both houses of congress, opens all the certificates, and the votes are then to be counted. The president of the senate counts the votes. The person having the greatest

number of votes of the electors for president, is president, if such number be a majority of the whole number of electors appointed; but if no person have such majority, then, from the persons having the highest number, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation of each state having one vote. The person having the greatest number of votes as vice president, is vice-president, if such number be a majority of the whole number of the electors appointed; and if no person have a majority, then, from the two highest numbers on the list, the senate shall choose the vice-president.

3. What are the powers of the president?—282

He is commander in chief of the army and navy of the United States, and of the militia of the several states, when called into actual service of the Union. The president has also power to grant reprieves and pardons for offences against the United States, except in cases of impeachment. He has also the power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur. The president is the efficient power in the appointment of the officers of the government. He is to nominate, and, with the advice and consent of the senate, to appoint ambassadors, or public ministers and consuls, the judges of the supreme court, and all other officers whose appointments are not otherwise provided for in the constitution.

4. How may the president be removed from office?—289

By impeachment. The president as well as all other officers of the United States, may be impeached by the house of representatives, for treason, bribery, and other high crimes and misdemeanors, and, upon conviction by the senate, removed from office.

LECTURE XIV.

OF THE JUDICIARY DEPARTMENT.

1. What power interferes more visibly and uniformly, than any other part of government, with all the interesting concerns of social life?—290

The judiciary power. Personal security and private property, rest entirely upon the wisdom, the stability, and the integrity of the courts of justice.

2. In what does the constitution declare the judicial power of the United States shall be vested ?—290

In one supreme court, and such inferior courts as congress may from time to time ordain and establish.

3. What is the term during which the judges hold their office ?—292

During good behaviour.

4. What is the extent of the judicial power ?—295

It extends to all cases in law and equity arising under the constitution, the laws and treaties of the Union; to all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies between two or more states; to controversies between a state, when plaintiff, and the citizens of another state, or to foreign citizens or subjects; to controversies between citizens of different states, and between citizens of the same state, claiming lands under grants of different states; and between a state, or citizens thereof, and foreign states, and between citizens and foreigners.

5. What is provided in the amendment of 1794 ?—297

That the judicial power of the United States should not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state. The inhibition applies only to citizens or subjects, and does not extend to suits by a state, or foreign states or powers.

6. Of how many judges does the supreme court consist ?—298

Of one chief justice, and six associate justices, any four of whom make a quorum; and it holds one term annually, at the seat of government, commencing on the second Monday in January.

7. In what cases has the supreme court exclusive jurisdiction ?—298

In all controversies of a civil nature, where a state is a party, except in suits by a state against one or more of its citizens, or against citizens of other states, or aliens, in which cases it has original, but not exclusive jurisdiction. It has also, exclusively, all such jurisdiction of suits, or proceedings against ambassadors, or other public ministers, or their domestics or servants, as a court of law can have or exercise, consistently with the law of nations; and original, but not exclusive jurisdiction, of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul shall be a party. The supreme court was also clothed by the constitution "with appellate jurisdiction, both as to law and fact, with such exceptions and regulations as congress should make."

8. In what cases has the supreme court appelate jurisdiction?—299

By the judiciary act of 1789, appeals lie to this court from the circuit courts, and the courts of the several states. Final judgments and decrees, in civil actions, and suits in equity in the circuit courts of the United States, whether brought by original process, or removed there, from the state courts, or by appeal from the district courts, in cases where the matter in dispute exceeds 2,000 dollars, exclusive of costs, may be re-examined, by writ of error, and reversed or affirmed, by the supreme court. Final judgments and decrees in the circuit courts, in cases of admiralty and maritime jurisdiction, and of prize or no prize, where the matter in dispute exceeds 2,000 dollars, exclusive of costs, may be reviewed on appeal in the supreme court.

9. Into how many circuits are the United States divided?—301

Seven.

10. In what cases have the circuit courts original jurisdiction?—302

They have original cognizance, concurrent with the state courts, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds 500 dollars, exclusive of costs, and the United States are plaintiffs, or an alien is a party, or the suit is between a citizen of the state where the suit is brought, and a citizen of another state. They have likewise exclusive cognizance, except in certain cases, of all crimes and offences cognizable under the laws of the United States, exceeding the degree of ordinary misdemeanors, and of them they have concurrent jurisdiction with the district courts. They have also, original jurisdiction in equity and at law of all suits arising under the law of the United States relative to copyrights, and those growing out of inventions and discoveries, and to protect such rights by injunction. The jurisdiction in the case of copyrights applies, without regard to the character of the parties, or the amount in dispute.

11. In what cases have the circuit courts appelate jurisdiction?—302

From all final decrees and judgments in the district courts, where the matter in dispute, exclusive of costs, exceeds 50 dollars. If the remedy be on final decrees in the district courts, in cases of admiralty and maritime jurisdiction, it is by appeal; and if on final judgments in civil cases, it is by writ of error. And if any suit be commenced in a state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, or against a citizen of the same state claiming lands under a grant from another state, and the matter in dispute exceeds 500 dollars, exclusive of costs, the defendant, on giving security may remove the cause to the next circuit court.

12. In what cases have the district courts jurisdiction?—304

They have exclusive of the state courts, cognizance of all the lesser

crimes and offences cognizable under the authority of the United States, and committed within their respective districts, or upon the high seas, and which are punishable by fine not exceeding 500 dollars, by imprisonment not exceeding 6 months, or when corporal punishment, not exceeding 30 stripes, is to be inflicted. They have also exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction of seizures under impost, navigation, or trade laws of the United States, where the seizures are made upon the high seas, or on waters within their districts navigable from the sea with vessels of ten or more tons burthen; and also of all seizures made under the laws of the United States; and also of all suits for penalties and forfeitures incurred under those laws. They have also cognizance, concurrent with the circuit courts and state courts, of causes where an alien sues for a tort committed in violation of the law of nations, or a treaty of the United States; and of all suits at common law, in which the United States are plaintiffs, and the matter in dispute amounts, exclusive of costs, to 100 dollars. They have jurisdiction likewise, exclusive of the courts of the several states, of all suits against consuls, except for offences above the magnitude which has been mentioned. They have also cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marinele ague of its coasts; and to repeal patents unduly obtained.

13. What authority have the superior courts of the several territories? —305

In those territories in which there is no district court established, they have the enlarged authority of the circuit courts, subject to revision by writ of error, and appeal to the supreme court.

14. What restrictions are placed upon the judges of the federal courts? —305

The district and territorial judges are required to reside within their respective jurisdictions, and no federal judge can act as counsel, or be engaged in the practice of the law.

LECTURE XV.

OF THE ORIGINAL AND APPELLATE JURISDICTION OF THE SUPREME COURT.

1. What is the rule, laid down by the supreme court, on the subject of jurisdiction on account of the interest that a state has in the controversy? —323

That it must be a case in which a state is nominally the party; and it is not sufficient that the state may be consequentially affected, as being bound to make retribution to her grantee upon the event of eviction.

2. What is the rule as to the appellate jurisdiction of the supreme court? —324

That it exists only in cases in which it is affirmatively given. In the case of *Wiscart* v. *Dauchy*, (3 *Dallas*, 321,) the supreme court considered that its whole appellate jurisdiction depended upon the regulations of congress, as that jurisdiction was given by the constitution in a qualified manner.

LECTURE XVI.

OF THE JURISDICTION OF THE FEDERAL COURTS, IN RESPECT TO THE COMMON LAW, AND IN RESPECT TO PARTIES.

1. What are the decisions upon the right of the federal courts to common law jurisdiction, in criminal matters?—339

The decisions are, that they have no such jurisdiction.

2. How far have the supreme court admitted the application of the common law to civil cases in the federal courts?—341

In *Robinson* v. *Campbell*, (3 *Wheaton*, 212,) the supreme court went far toward the admission of the existence and application of the common law to civil cases in the federal courts.

3. What is it necessary to set forth on the record in order to give jurisdiction where an alien is a party?—343

In *Bingham* v. *Cabot*, (3 *Dallas*, 382,) the supreme court held, that it was necessary to set forth the citizenship of the respective parties, or the alienage where a foreigner was concerned, by positive averments; and that if there was not a sufficient allegation for that purpose on the record, no jurisdiction of the suit would be sustained. It is necessary, therefore, where the defendant appears to be a citizen of one state, to show, by averment, that the plaintiff is a citizen of some other state, or an alien; or, if the suit be upon a promissory note, by the endorsee, to show that the original payee was so.

4. What is the rule in cases of joint plaintiffs or defendants?—345

In *Strawbridge* v. *Curtiss*, (3 *Cranch*, 267,) that where the interest was joint and two or more persons concerned in that interest, as joint plaintiffs, or joint defendants, each of them must be competent to sue, or be liable to be sued, in the federal courts; and the suit was dismissed in that case, because some of the plaintiffs and defendants were citizens of the same state.

5. What is the rule where a corporation is a party?—346

It was decided in the cases of the *Hope Insurance Company* v. *Boardman*, and of the *Bank of the United States* v. *Deveaux*, (5 *Cranch*, 57, 61,) that a corporation aggregate was not, in its corporate capacity, a citizen, and that its right to litigate in the federal courts depended upon the character of the individuals who composed the body politic, and which character must appear by proper averments upon the record. If any of the stockholders are citizens of the same state with the defendant, the federal courts have no jurisdiction.

6. What is the rule in regard to trustees?—348

That a trustee who holds the legal interest, is competent to sue in right of his own character as a citizen or alien, as the case may be, in the federal courts, and without reference to the character of his *cestui que trust*, unless he was created trustee for the fraudulent purpose of giving jurisdiction. This rule applies to executors and administrators, who are considered as the real parties in interest; but it does not apply to the general assignee of an insolvent debtor. The 11th section of the judiciary act will not permit jurisdiction to vest by the assignment of a *chose in action*, (cases of foreign bills of exchange excepted.) A vested jurisdiction is not devested by a subsequent change of domicil.

7. What is the rule of proceeding where a state is interested, and not a party on record?—350

In the case of *Osborn* v. *The Bank of the United States*, (9 *Wheaton*, 783) the court decided, that the circuit courts had lawful jurisdiction, under the act of congress incorporating the national bank, of a bill in equity brought by the bank for the purpose of protecting its franchises, which were threatened by the state of Ohio; and that as the state itself could not be made a party defendant, the suit might be maintained against the officers and agents of the state who were intrusted with the execution of such laws.

LECTURE XVII.

OF THE DISTRICT AND TERRITORIAL COURTS OF THE UNITED STATES.

1. What is the distinction in England between the *instance* and the *prize court* of admiralty?—353

The former is the ordinary admiralty court, but the latter is a special and extraordinary jurisdiction; and although it be exercised by the same person, it is in no way connected with the former, either in its origin, its mode of proceeding, or the principles which govern it. To constitute the prize court, or to call it into action in time of war, a special commission issues, and the court proceeds summarily, and is governed by general principles of policy, and the law of nations.

2. Over what cases have the prize courts jurisdiction?—356

The ordinary prize jurisdiction extends to all captures in war, made on the high seas. I know of no other definition of prize goods, said Sir Willian Scott, in the case of the *Two Friends*, (1 *Rob. Rep.* 228,) than that they are goods taken on the high seas, *jure belli*, out of the hands of the enemy. The prize jurisdiction also extends to captures in foreign ports and harbours, and to captures made on land by naval forces, and upon surrenders to naval forces, either solely, or by joint operation with land forces. It extends to captures made in rivers, ports, and harbours, of the captor's own country. The prize court extends also to all ransom bills upon captures at sea, and to money received as a ransom or commutation, on a capitulation to naval forces alone, or jointly with land forces.

3. What is the rule in cases of freight?—359

That prize courts have exclusive jurisdiction, and an enlarged discretion, as to the allowance of freight, damages, expenses, and costs, in all cases of captures, and as to all torts, and personal injuries, and ill treatments, and abuse of power, connected with capture *jure belli;* and the courts will frequently award large and liberal damages in those cases.

4. How far does the criminal jurisdiction of the district courts extend?—360

To the cognizance of all crimes and offences cognizable under the authority of the United States, and committed within their districts, or upon the high seas, where only a moderate corporal punishment, or fine, or imprisonment is to be inflicted.

5. What forms the dividing line between the admiralty and common law jurisdiction of the district court?—375

In seizures made on land, the district court proceeds as a court of common law, according to the course of the English exchequer, on information *in rem*, and the trial of issues of fact is to be by jury. But in cases of seizures on waters navigable from the sea, by vessels of ten or more tons burthen, the court proceeds as an instance court of admiralty, by libel *in rem*, and the trial is by the court.

6. How far does the jurisdiction of the admiralty, as an instance court extend ?—378

In England, the instance court of admiralty, takes cognizance only of crimes committed, and things done, and contracts not under seal, made *super altum mare*, and without the body of a county. The admiralty has cognizance of maritime hypothecations of vessels and goods in foreign ports, for repairs done, or necessary supplies furnished. Suits for seamen's wages, are cognizable in the admiralty, though the contract be made upon land, provided it be not a contract under seal.

LECTURE XVIII.

OF THE CONCURRENT JURISDICTION OF THE STATE GOVERNMENTS.

1. What is the observation of the Federalist upon the subject of concurrent rights ?—387

That the state governments would clearly retain all those rights of sovereignty which they had before the adoption of the constitution of the United States, and which were not by that constitution exclusively delegated to the Union.

2. What is the doctrine of the supreme court on that point ?—388

In *Sturges* v. *Crowninshield*, (3 *Dallas*, 386,) the chief justice observed, that the powers of the states remained, after the adoption of the constitution, what they were before, except so far as they had been abridged by that instrument. The mere grant of a power to congress did not imply a prohibition on the states to exercise that power. Thus, congress are authorized to establish uniform laws on the subject of bankruptcy, but the states may pass bankrupt laws, provided there be no act of congress in force establishing a uniform law on that subject. It is not the mere resistance of the power, but it is the exercise of that power, which is incompatible with the exercise of the same by the states. In *Houston*

v. *Moore*, (5 *Wheaton*, 1,) the doctrine of the court was, that when congress exercised their powers upon any given subject, the states could not enter upon the same ground, and provide for the same objects. The will of congress may be discovered as well by what they have not declared, as by what they have expressed. It is not a true and constitutional doctrine, that in cases where the state governments have a concurrent power of legislation with the national government, they may legislate upon any subject on which congress have acted, provided the two laws are not in their operation contradictory and repugnant to each other.

3. How far can the process of the federal courts be controlled by the laws of the several states ?—394

In *Weyman* v. *Southard*, (10 *Wheaton*, 1,) it was decided, that congress had exclusive authority to regulate proceedings and executions in the federal courts, and that the states had no authority to control such process ; and, therefore, executions by *fieri facias*, in the federal courts, were not subject to the checks created by the Kentucky statute, forbidding sales on execution of land for less than three-fourths of its appraised value.

4. What is the rule laid down by the Federalist, as to concurrent judicial jurisdiction of the states ?—395

That the state courts retained all pre-existing authority, or the jurisdiction they had before the adoption of the constitution, except where it was taken away, either by an exclusive authority granted in express terms to the Union, or in a case where a particular authority was granted to the Union, with which a similar authority in the states would be utterly incompatible.

5. In what cases do the state courts not have concurrent jurisdiction ? —398

They can exercise no jurisdiction whatever over crimes and offences against the United States, and all suits, penalties, and forfeitures unless where, in particular cases, the laws otherwise provide.

6. What is the effect of a sentence in one jurisdiction in cases of concurrent jurisdiction ?—399

That the sentence of either court, whether of conviction or acquittal, may be pleaded in bar of a prosecution before the other.

7. What is the doctrine as to the power of congress to compel a state court to entertain jurisdiction ?—402

That congress cannot compel a state court to entertain jurisdiction in any case. It only permits state courts which are competent for the purpose, and have an inherent jurisdiction adequate to the case, to entertain suits in the given cases; and they do not become inferior courts in the sense of the constitution, because they are not ordained by congress.

The state courts are left to infer their own duty from their own state authority and organization; but if they do voluntarily entertain jurisdiction of causes cognizable under the laws of the United States, they assume it upon the condition that the appellate jurisdiction of the federal courts shall apply.

LECTURE XIX.

OF CONSTITUTIONAL RESTRICTIONS ON THE POWERS OF THE SEVERAL STATES.

1. What are the principal constitutional restrictions?—406

That no state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility. No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; nor lay any duty or tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

2. What is the construction put upon the prohibition to issue bills of credit?—408

It is declared to mean promissory notes, or bills issued exclusively on the credit of the state, and for the payment of which the faith of the state is pledged. The prohibition does not, therefore, apply to the notes of a state bank, drawn on the credit of a particular fund set apart for that purpose. According to the case of *Craig* v. *The State of Missouri*, (4 *Peters' U. S. Rep.*, 410,) bills of credit are defined to be paper issued by a state government, and intended to circulate through the community for its ordinary purposes, as money redeemable at a future day.

3. What is the construction upon the prohibition to pass *ex post facto* laws?—408

In *Calder* v. *Bull*, (3 *Dallas*, 386,) it was held, that the words *ex post facto* laws were technical expressions, and meant every law that made an act done before the passing of the law, and which was innocent when done, criminal; or which aggravated a crime, and made it greater than it

was when committed; or which altered the legal rules of evidence, and received less or different testimony than the law required at the time of the commission of he offence, in order to convict the offender. In *Fletcher* v. *Peck*, (6 *Cranch*, 138,) it was observed than an *ex post facto* law was one which rendered an act punishable in a manner in which it was not punishable at the time when it was committed.

4. What is the rule as to the control of the state courts over the federal courts?—409

That the state legislatures cannot annul the judgments, nor determine the jurisdiction of the courts of the Union. No state tribunal can interfere with seizures of property made by the revenue officers, under the laws of the United States.

5. How far are persons engaged in the transportation of the mail, exempt from the control of state process?—411

In the case of *The United States* v. *Barney*, (3 *Hall's Law Journal*, 128,) the district judge of Maryland decided that, an inn-keeper had no lien on a horse which he had fed, and which was employed in the transportation of the mail; and that a claim for debt would not justify the stopping of the mail, or the means necessary to transport it; and that even a stolen horse, found in the mail stage could not be seized; nor could the driver, being in debt, be arrested in such a way as to obstruct the passage of the mail.

6. What is the construction put upon the prohibition to pass laws impairing the obligation of contracts?—413

The case of *Fletcher* v. *Peck*, (6 *Cranch*, 87,) first brought this prohibtory clause into direct discussion. The legislature of Georgia, by act of 7 of January, 1795, authorized the sale of a tract of wild land, and a grant was made by letters patent in pursuance of the act, to a number of individuals, under the name of the Georgia Company. Fletcher held a deed from Peck for a part of this land, under the patent; and in the deed Peck had covenanted, that the state of Georgia was lawfully seized when the act was passed, and had good right to sell, and that the letters patent were lawfully issued, and the title has not since been legally impaired. The action was for a breach of covenant; and the breach assigned was, that the letters patent were void, for, that the legislature of Georgia by act of the 13th Febuary, 1796, declared the preceding act to be null and void, as being founded in fraud and corruption. One of the questions presented to the supreme court upon the case was, whether the legislature of Georgia could constitutionally repeal the act of 1795, and rescind the sale made under it. The court declared, that when a law was in its nature a contract, and absolute rights have vested under that contract, a repeal of the law could not divest those rights, nor annihilate or impair the title so acquired. A grant was a contract within the meaning of the constitution. The words of the constitution were construed to comprehend equally ex-

ecutory and executed contracts, for each of them contains obligations binding on the parties. A grant is a contract executed, and a party is always estopped by his own grant. A party cannot pronounce his own deed invalid. A grant amounts to an extinguishment of the right of the grantor. A grant from a state is as much protected by the constitution as a grant from one individual to another, and the state is as much inhibited from impairing its own contracts, or a contract to which it is a party, as it is from impairing the obligation of contracts between two individuals. It was, accordingly, declared, that the estate held under the act of 1795, having passed into the hands of a *bona fide* purchaser for a valuable consideration, the state of Georgia was constitutionally disabled from passing any law whereby the estate of the plaintiff could be legally impaired or rendered void. In the case of *The State of New Jersey* v. *Wilson*, (7 *Cranch*, 164,) it was held, that if the legislature should declare by law, that certain lands to be thereafter purchased for the use of the Indians, should not be subject to any tax, such a legislative act amounted to a contract, which could not be recinded by a future legislature. In *Terret* v. *Taylor*, (9 *Cranch*, 43,) it was held that, a legislative grant, competently made, vested an indefeasible and irrevocable title. Nor can the legislature repeal statutes creating private corporations, or confirming to them property already acquired, under the faith of previous laws, and by such repeal vest the property in others, without the consent or default of the corporators. In the case of *Dartmouth College* v. *Woodward*, (4 *Wheaton* 518,) it was held, that the charter granted by the British crown to the trustees of Dartmouth college in 1769, was a contract within the meaning of the constitution, and protected by it; and that the college was a private charitable institution, not liable to the control of the legislature; and that the act of the legislature of New Hampshire, altering the charter in a material respect, without the consent of the corporation, was an act impairing an obligation of the charter, and consequently unconstitutional and void.

In *Green* v. *Biddle*, (8 *Wheaton*, 1,) it was observed by the court, that the objection to a law, on the ground of its impairing the obligation of contracts, could not depend upon the extent of the change. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are expressed, however minute or apparently immaterial in their effect upon the contract, or upon any part of it, impairs its obligation. The material point decided was, that a compact between two states was a contract within the constitutional prohibition. In the case of *Sturges* v. *Crowninshield*, (4 *Wheaton*, 122,) the defendant was sued in one of the federal courts upon two promissory notes given in March, 1811, and he pleaded his discharge under an insolvent act of New York, passed in April, 1811. The chief justice, in the opinion which he delivered on behalf of the court, admitted, that until congress exercise the power to pass uniform laws on the subject of bankruptcy, the individual states might by law discharge debtors from imprisonment, for imprisonment was no part of the contract, but only a means of coercion. It was also admitted, that they might pass statutes

of limitation, for such statutes relate to the remedy, and not to the obligation of the contract. But a law which discharged the debtor from his contract to pay a debt by a given time, without performance, and released him, without payment, entirely from any future obligation to pay, impaired, because it entirely discharged, the obligation of that contract, and, consequently, the discharge of the defendant, under the act of 1811, was no bar to the suit.

5. How is the prohibition to pass naturalization laws construed ?—424

In *Chirac* v. *Chirac*, (2 *Wheaton*, 269,) the chief justice of the United States decided, that the power to pass naturalization laws was vested exclusively in congress.

6. How is the inability of the states to tax national property settled ? —425

That the state governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers, nor to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by congress, to carry into effect the powers vested in the national government.

A tax on loans made to the United States is unconstitutional.

7. What is the rule as to state jurisdiction over places ceded to the United States ?—429

That the state legislatures lose all jurisdiction over places purchased by congress, by the consent of the legislature of the state, for the erection of forts, dock yards, light houses, hospitals, military academies, and other needful buildings.

8. What is the construction put upon the power of congress to regulate commerce among the states ?—431

That non-intercourse and embargo laws are within the powers of congress ; and if congress have the power, for purposes of safety, or preparation, or counteraction, to suspend commercial intercouse with foreign nations, they are not limited as to the duration, more than as to the manner and extent of the measure.

It was decided in the supreme court of the United States in *Gibbons* v. *Ogden*, (9 *Wheaton*, 1,) that the acts of the legislature of New York, granting to Livingston and Fulton the exclusive navigation of the waters of the state, in vessels propelled by steam, were unconstitutional and void acts, and repugnant to the power given to congress to regulate commerce, so far as those acts went to prohibit vessels licensed under the laws of congress for carrying on the coasting trade, from navigating the waters of New York.

LECTURE XX.

OF THE STATUTE LAW.

1. What is municipal law?—447

It is a rule of civil conduct prescribed by the supreme power in a state. It is composed of written and unwritten, or statute and common law.

2. What is statute law?—447

It is the express or written will of the legislature, rendered authentic by certain prescribed forms and solemnities.

3. What authority has an act of the English parliament?—447

It is a principle of the English law, that an act of parliament, delivered in clear and intelligible terms, cannot be questioned in any court of justice.

4. What is the observation of Sir William Blackstone on this subject?—447

That it is the exercise of the highest authority which the kingdom acknowledges on earth.

5. How is the principle in the English government, that parliament is omnipotent, received in the United States?—448

It does not prevail; though, if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power in any foreign country. But in this, as in all other countries where there is a written constitution, designating the powers and duties of the legislative, as well as of the other departments of government, an act of the legislature may be void as being against the constitution. The law with us must conform, in the first place, to the constitution of the United States, and then to the subordinate constitution of its particular state, and if it infringes either, it is void.

6. By whom is the constitutionality of a law determined?—449

By the judiciary. The courts of justice have a right, and are in duty bound, to bring every law to the test of the constitution, first, of the United States, and then of their own state, as the paramount and supreme law, to which every inferior or derivative power and regulation must conform.

7. How is the constitution defined?—449

To be the act of the people, speaking in their original character, and defining the permanent conditions of the social alliance.

8. What was the argument of the supreme court of the United States, in the case of *Marbury* v. *Madison*, (1 *Cranch*, 137,) on the power and duty of the judiciary to disregard an unconstitutional act of congress? —453

The question, said the chief justice, was, whether an act repugnant to the constitution, can become a law of the land, and it was one deeply interesting to the United States. The powers of the legislature are defined and limited by a written constitution. But to what purpose is that limitation, if those limits may at any time be passed? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited, and acts allowed, are of equal obligation. If the constitution does not control any legislative act repugnant to it, then the legislature may alter the constitution by an ordinary act. The theory of every government, with a written constitution, forming the fundamental and paramount law of the nation, must be, that an act of the legislature repugnant to the constitution is void. If void, it cannot bind the courts, and oblige them to give it effect; for this would be to overthrow, in fact, what was established in theory, and to make that operative as law which is not law. It is the province and duty of the judicial department, to say what the law is; and if two laws conflict with each other, to decide on the operation of each. So, if the law be in opposition to the constitution, and both apply to a particular case, the court must either decide the case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law. If the constitution be superior to an act of the legislature, the courts must decide between these conflicting rules, and how can they close their eyes on the constitution, and see only the law?

9. From what time does a statute take effect?—454

From its date, if no time be expressed. But remedial statutes may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing.

10. What was the English rule?—456

That if no period was fixed by the statute itself, it took effect by relation, from the first day of the session in which it was passed. By the statute 33 Geo. 3. ch. 13, it was declared, that statutes are to have effect only from the time they receive the royal assent.

11. What is the rule of the code of Napoleon?—458

It declares that laws are binding from the moment their promulgation can be known, and that the promulgation should be considered as known in the department of the imperial residence one day after the promulgation,

and in each of the other departments of the French empire, after the expiration of the same length of time, augmented by as many days as there were twenty leagues between the seat of government and the place.

12. What is the distinction between public and private acts?—459

Generally, statutes are public; and a private statute may be considered rather as an exception to a general rule. It operates upon particular individuals, or upon private persons. It is said not to bind, or include strangers in interest to its provisions, and they are not bound to take notice of a private act, even though there be no saving clause of the rights of third persons.

13. What are the rules for the interpretation of statutes?—460

It is an established rule in the exposition of statutes, that the intention of the lawgiver is to be deduced from a view of the whole, and every part of a statute, taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of terms, and the reason and intention of the lawgiver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction, and absurdity. When the words are not explicit, the intention is to be collected from the context, from the occasion, from the necessity of the law, from the mischief felt, and the remedy in view. Several acts *in pari materia*, and relating to the same thing, are to be taken together, and compared, in the construction of them.

14. What is the effect of temporary statutes?—465

If an act be penal and temporary by the terms or nature of it, the party offending must be prosecuted and punished before the act expires, or be repealed. Though the offence be committed before the expiration of the act, the party cannot be punished after it has expired, unless a particular provision be made for that purpose. If a statute be repealed, and afterwards the repealing clause is repealed, this revives the original act; and if an act be temporary, and limited to a number of years, and before the expiration of the time it be continued by another act, all acts civil and criminal are to be charged under the authority of the first act.

15. What is the effect of a penalty prescribed in a statute?—467

If a statute inflicts a penalty for doing an act, the penalty implies a prohibition, and the thing is unlawful.

LECTURE XXI.

OF REPORTS OF JUDICIAL DECISIONS.

1. What does the common law include?—470

Those principles, usages, and rules of action, applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature.

2. What are the sources of the common law?—470

A great proportion of the rules and maxims which constitute the immense code of common law, grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference. It was the application of the dictates of natural justice, and of cultivated reason, to particular cases.

3. What is the language of Sir Matthew Hale respecting the common law?—470

That it is not the product of the wisdom of one man, or society of men, in any one age; but of the wisdom, counsel, experience, and observation, of many ages of wise men.

4. What is the force of adjudged cases?—473

The reports of judicial decisions contain the most certain evidence, and the most authoritative and precise application of the rules of the common law. Adjudged cases become precedents for future cases resting upon analogous facts, and brought within the same reason. A solemn decision upon any point of law, arising in any given case, becomes authority in a like case.

LECTURE XXIII.

OF THE CIVIL LAW.

1. By whose order was the great body of the Roman or civil law collected and digested?—515

By the order of the Emperor Justinian, in the early part of the sixth century.

2. Where was this venerable system of the civil law created?—515

It was created and gradually matured on the banks of the Tiber, by the successive wisdom of Roman statesmen, magistrates, and sages.

3. Of what did the twelve tables consist?—521

Partly of entire laws transcribed from the institutions of other nations, and partly of such as were altered and accommodated to the manners of the Romans, partly of new provisions, and partly of the laws and usages of their ancient kings.

END OF VOLUME FIRST.

VOLUME II.

OF THE LAW CONCERNING THE RIGHTS OF PERSONS.

LECTURE XXIV.

OF THE ABSOLUTE RIGHTS OF PERSONS.

1. How are the rights of persons in private life divided ?—1

Into either absolute or relative.

2. What are absolute rights ?—1

Such as belong to individuals in a single unconnected state.

3. What are relative rights ?—1

Those which arise from the civil and domestic relations.

4. What three absolute rights are named by the commentator ?—1

The right of personal security ; the right of personal liberty ; and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable.

5. On what does the effectual enjoyment of them depend ?—1

Upon civil liberty ; and that consists in being protected and governed by laws made, or assented to, by the representatives of the people, and conducive to the general welfare.

The history of our colonial governments bears constant marks of the vigilance of a free and intelligent people, who understood the best securities for political happiness, and the true foundation of the social ties. The inhabitants of the colonies of Plymouth and Massachusetts, in the infancy of their establishments, declared by law that the free enjoyment of the liberties which humanity, civility, and christianity called for, was due to every man in his place and proportion, and ever had been, and ever would be, the tranquillity and stability of the commonwealth. They insisted that they brought with them into this country the privileges of English freemen ; and they defined and declared those privileges, with a caution, sagacity, and precision, that have not been supassed by their descendants.

6. What was their fundamental doctrine ?—2

That no tax, aid, or imposition whatever, could rightfully be assessed or levied upon them, without the act or consent of their own legislature ; and that justice ought to be equally, freely, impartially, and promptly administered. The right of trial by jury, and the necessity of due proof preceding conviction, were claimed to be undeniable rights ; and it was further expressly ordained, that no person should suffer without express law, either in life, limb, liberty, good name, or estate ; nor without first being brought to answer by due course and process of law.

7. What are the fifteen provisions named by the commentator, for guarding the right of personal security ?—12

1. That no person except on impeachment, and in the cases arising in the military and naval service, shall be held to answer for a crime above petit larceny, unless he shall have been previously charged, on the presentation or indictment of a grand jury.

2. No person shall be subject, for the same offence, to be twice put in jeopardy of life or limb.

3. Nor be compelled in any criminal case, to be a witness against himself.

4. In all criminal prosecutions, the accused is entitled to a speedy and public trial by an impartial jury.

5. And upon the trial he is entitled to be confronted with the witnesses against him.

6. To have compulsory process for witnesses in his favour.

7. To have the assistance of counsel in his defence.

8. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

9. No bill of attainder, nor *ex post facto* law can be passed.

10. No person can be deprived of life, liberty, or property, unless by the law of the land, or the judgment of his peers.

11. Every person in case of impending danger, is entitled to the protecting arm of the magistrate, and may require his adversary to be bound to keep the peace.

12. If violence has been actually offered, the offender is not only liable to a public prosecution and punishment, but is bound also to render the party injured compensation in damages.

13. Every man may exercise the natural right of self defence, in those cases where the law is either too slow, or too feeble, to stay the hand of violence.

14. Homicide is justifiable when necessary for self defence, or in defence of near relations, against persons attempting to commit a known felony, with force, against one's person, habitation, or property.

15. Every one is entitled to the enjoyment of his reputation.

8. Into what two kinds does the law distinguish injuries affecting the reputation of individuals ?—16

Into slander spoken and slander by writing, signs, or pictures. The

Roman law took this distinction between slander spoken and written, and the same distinction prevails in our law, which considers the slander of a private person by words, in no other light than a civil injury, for which a pecuniary compensation may be obtained.

9. In what does this injury consist?—16

In falsely and maliciously charging another with the commission of some public offence, or the breach of some public trust, or with any matter in relation to his particular trade or vocation, and which, if true, would render him unworthy of employment; or, lastly, with any other matter or thing, by which special injury is sustained.

10. What is a libel?—17

It is a malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one dead, or the reputation of one living, and expose him to public hatred, contempt, or ridicule. A malicious intent towards government, magistrates, or individuals, and an injurious or offensive tendency, must concur to constitute the libel.

11. In what light does the law consider this grievance?—17

As a public as well as a private injury; and has rendered the party not only liable to a private suit at the instance of the party libelled, but answerable to the state by indictment, as guilty of an offence tending directly to a breach of the public peace. But though the law be solicitous to protect every man in his fair fame and character, it is equally careful that the liberty of speech, and of the press, should be duly preserved. The liberal communication of sentiment, and entire freedom of discussion, in respect to the character and conduct of public men, and of candidates for public favour, is deemed essential to the judicious exercise of the right of suffrage, and of that control over their rulers, which resides in the free people of the United States. It has, accordingly become, a constitutional principle in this country, that "every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right, and that no law can rightfully be passed to restrain or abridge the freedom of speech, or of the press." The law of England, even under the Anglo-Saxon line of princes, took severe and exemplary notice of defamation, as an offence against the public peace; and in the time of Henry III., Bracton adopted the language of the Institutes of Justinian, and held slander and libellous writings to be actionable injuries.

12. Where is the first private suit, for slanderous words to be met with in the English law?—18

In the reign of Edward III., and for the high offence of charging another with a crime which endangered his life.—*Reeve's Hist. of English Law*, vol. 3, p. 90.

13. What is the general rule of evidence in prosecutions for injuries to private reputation?—18

That in a private action of slander for damages, even in the action of *scandalum magnatum*, the defendant may justify, by showing the truth of the fact charged. But in the case of a public prosecution for a libel, it became the established principle of the English law, as declared in the court of star chamber, about the beginning of the reign of James I., that the truth of the libel could not be shown by way of justification. The English common law doctrine of libel, is the common law doctrine of this country, in all cases in which it has not been expressly controlled by constitutional or legislative provisions.

14. How far is the common law of England, considered to be the law of the United States?—28

In all cases in which it has not been altered or rejected by statute, or varied by local usages, under the sanction of judicial decisions.

15. What are the principal statute provisions in New York, on the writ of *habeas corpus*?—29

That, all persons restrained of their liberty, under any pretence whatsoever, are entitled to prosecute this writ, unless they be persons detained: 1. By process from any court or judge of the United States, having exclusive jurisdiction in the case. 2. Or by final judgment or decree, or execution thereon, of any competent tribunal of civil or criminal jurisdiction, other than in a case of commitment for any alleged contempt. The application for the writ must be to the supreme court, or chancellor, or a judge of the court, or other officer, having the powers of a judge, at chambers; and it must be by petition in writing, signed by, or on behalf of the party; and it must state the grounds of the application, and the facts must be sworn to. The penalty of $1000, is given in favour of the party aggrieved, against every officer, and against every member of the court assenting to the refusal, if any court or officer authorized to grant the writ, shall refuse it when legally applied for. If the person to whom the writ is directed, or on whom it is served, shall not promply obey the writ, by making a full and explicit return, and shall fail to produce the party, without a sufficient cause, he is liable to be forthwith attached and committed, by the person granting the writ, to close custody, until he shall have obeyed the writ. A person discharged upon *habeas corpus* is not to be re-imprisoned for the same cause, and if any person solely, or as a member of any court, or in execution of any order, knowingly re-imprison such party, he forfeits a penalty of $1250 to the party aggrieved.

16. What has the constitution of the United States ordained upon the subject of religion?—35

That congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, and the same principle appears in all the state constitutions.

LECTURE XXV.

OF ALIENS AND NATIVES.

1. Who are natives ?—39

All persons born within the jurisdiction of the United States. If they were resident citizens at the time of the declaration of independence, though born elsewhere, and deliberately acceded to it an express or implied sanction, they became parties to it, and are to be considered as natives; their social tie being coeval with the existence of the nation.

2. What is the doctrine of the English law as to the allegiance of natural born subjects ?—42

That they owe an allegiance which is intrinsic and perpetual, and which cannot be devested by any act of their own. In the case of Macdonald, who was tried before Ch. J. Lee, and who, though born in England, had been educated in France, and spent his riper years there; his counsel spoke against the doctrine of natural allegiance as slavish, and repugnant to the principles of their revolution. The court, however, said, that it had never been doubted, that a subject born, taking a commission from a foreign prince, and committing high treason, was liable to be punished as a subject for that treason. They held, that it was not in the power of any private snbject to shake off his allegiance and transfer it to a foreign prince; nor was it in the power of any foreign prince by naturalizing or employing a subject of Great Britain, to dissolve the bond of allegiance between the subject and the crown.

3. What is the rule on this subject, in the United States ?—44

It is not settled, but the better opinion and more authorative doctrine is, that the English common law prevails, subject to the power of congress to regulate by law, but no such power has yet been exercised.

4. What is the law of France on this point ?—50

The French law will not allow a natural born subject of France, to bear arms, in time of war, in the service of a foreign power, against France; and yet, subject to that limitation, every Frenchmen is free to abdicate his country.

5. Who is an alien ?—50

An alien is a person born out of the jurisdiction of the United States. There are, however, some exceptions to this rule, as the children of ambassadors, (and other citizens temporarily absent,) born abroad.

6. What is the rule of the common law as to an alien's right to hold real estate?—53

That an alien cannot acquire title by descent, or created by other mere operation of law.

7. What is the general rule, if an alien purchase land, or if land be devised to him?—54

That he may take and hold, until an inquest of office has been had; but upon his death, the land would instantly, and of necessity, (as the freehold cannot be kept in abeyance,) without any inquest of office, escheat and rest in the state, because he is incompetent to transmit by hereditary descent.

8. May natural born subjects inherit, through an alien, the estates of their ancestors?—56

They may.

9. What property may aliens acquire?—62

They may take a lease for years, of a house for the benefit of trade; and they are capable of acquiring, holding, and transmitting personal property in like manner as our citizens, and they can bring suits for the recovery and protection of that property. They may take a mortgage upon real estate, by way of security for a debt, and are entitled to come into a court of equity, and have the mortgage foreclosed.

10. In what manner, under the act of May, 1828, may an alien become a citizen of the United States?—64

It is required, that he declare, on oath, before a state court, being a court of record, with a seal and clerk, and having common law jurisdiction, or before a circuit or district court of the United States, or before a clerk of either of said courts, two years, at least, before his admission, his intention to become a citizen, and to renounce his allegiance to his own sovereign. At the time of his admission, his country must be at peace with the United States, and he must, before one of these courts, take an oath to support the constitution of the United States, and likewise, on oath, to renounce and abjure his native allegiance. He must, at the time of his admission, satisfy the court, by other evidence than his own oath, that he has resided five years at least, within the United States, and one year, at least, within the state where the court is held; and if he have arrived after the peace of 1815, his residence must have been continued for five years next preceding his admission, without being at any time, during the five years, out of the territory of the United States. He must satisfy the court, that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. He must, at the same time, renounce any title, or order of nobility, if any he hath.

11. To whom does the act of congress confine the description of aliens capable of naturalization?—72

To "free white persons," I presume, (says the commentator;) this excludes the inhabitants of Africa, and their descendants, and it may become a question to what extent persons of mixed blood are to be excluded, and what shades and degrees of mixture of colour disqualify an alien from application for the benefits of the act of naturalization. Perhaps there might be difficulties also as to the copper-coloured natives of America, or the yellow or tawny races of Asiastics, and it may well be doubted whether any of them are "white persons," within the purview of the law. It is the declared law of New York and South Carolina, that Indians are not citizens, but distinct tribes, living under the protection of government, and, consequently, never can be made citizens under the act of congress.

LECTURE XXVI.

OF THE LAW CONCERNING MARRIAGE.

1. What is the primary and most important of the domestic relations?—74

That of husband and wife.

2. In what has it its foundation?—74

In nature, and is the only lawful relation by which Providence has permitted the continuance of the human race.

3. What is its moral influence?—74

In every age it has had a propitious influence on the moral improvement and happiness of mankind. It is one of the chief foundations of social order. We may justly place to the credit of the institution of marriage, a great share of the blessings which flow from refinement of manners, the education of children, the sense of justice, and the cultivation of the liberal arts.

4. Who are incapable of contracting marriage?—74

All persons who have not the regular use of their understanding, sufficient to deal with discretion in the common affairs of life, as idiots, and lunatics, (except in their lucid intervals,) are incapable of agreeing to any contract, and of course to that of marriage.

5. What does the law consider as the basis of the marriage contract? —76

The consent of the parties, and the ingredient of fraud or duress, is fatal in this as in any other contract, for the free assent of the mind is wanting. The common law allowed divorces *a vinculo*, *causa metus*, *causa impotentia*, and those were cases of a fradulent contract. It is said that error will, in some cases, destroy a marriage, and render the contract void, as if one person be substituted for another. This, however, would be a case of palpable fraud, going to the ground of the contract; and it would be difficult to state a case, in which error simply, and without any other ingredient, as to the parties, or one of them, in respect to the other, would vacate the contract. It is well understood that error, and even disingenuous representations, in respect to the qualities of one of the contracting parties, as his condition, rank, fortune, manners, and character, would be insufficient. The law makes no provision for the relief of a blind credulity however it may have been produced.

6. What is the age of consent fixed by the common law?—78

Fourteen years in males, and twelve in females. This rule was derived from the civil law which established the same periods of twelve and fourteen, as the competent age to render the contract binding, the same rule prevailed in France, before their revolution; but by the code of Napoleon, the age of consent was raised to eighteen in males, and fifteen in females, though a dispensation from the rule may be granted for good cause.

7. How does the law regard a second marriage, while a former husband or wife is living?—79

As absolutely null and void; and it is probably an indictable offence in most, if not all of the states of the union. In New York, it is declared by statute, to be an offence punishable by imprisonment in the state prison, in all but certain excepted cases.

8. What are those cases?—79

When the husband or wife, as the case may be, of the party who remarries, remains continually without the United States for five years together; or when one of the married parties shall have absented from the other by the space of five successive years, and the one remarrying not knowing the other, who had absented, to be living within that time; or when the person re-marrying was, at the time of such marriage, divorced by sentence of a competent court, or if the former husband or wife of the person re-marrying had been sentenced to imprisonment for life; or if the former marriage has been duly declared void, or made within the age of consent.

9. How does the law regard the intermarriage of relations?—82

In most countries of Europe in which the canon law has had authority or influence, marriages are prohibited between near relations by blood or marriage. Prohibitions similar to the canonical disabilities in the English ecclesiastical law, were contained in the Jewish laws; and they existed also in the laws and usages of the Greeks and Romans, subject to considerable alternations of opinion, and various modifications and extent. It is very difficult to ascertain exactly the point at which the laws of nature have ceased to discountenance the union. It is very clearly established that marriages between relations by blood in the lineal, ascending or descending lines, are unnatural and unlawful, and they lead to a confusion of rights and duties. On this point, the civil, canon, and the common laws are in perfect harmony. In several of the United States, marriages within the levitical degrees, under some exceptions, are made void. In New York, marriages between relatives of the ascending and descending lines and between brothers and sisters, of the half as well as of the whole blood are declared incestuous and void. So in Massachusetts. In Ohio marriages between nearer of kin than first cousins are void. So in Louisiana; and this according to the civil law.

10. What is the rule respecting the consent of parents and guardians? —84

That it is not requisite to the validy of a marriage.

11. What are the ceremonies required?—86

No peculiar ceremonies are requisite by the common law, to the valid celebration of marriage. The consent of the parties is all that is required; and marriage is said to be a contract *jure gentium*, that consent is all that is required by natural or public law. If the contract be made *per verba de præsenti*, and remains without cohabitation, or if made *per verba de futuro*, and is followed by consummation, it amounts to a valid marriage, and which the parties cannot dissolve, and it is equally binding as if made *in facie ecclesiæ*.

12. In what light does the law consider marriage?—87

In no other light than as a civil contract.

13. How must the consent of the parties be declared?—87

It may be declared before a magistrate, or simply before witnesses, or subsequently confessed or acknowledged, or the marriage may even be inferred from continual cohabitation, and reputation as husband and wife, except in cases of civil actions for adultery, or public prosecutions for bigamy. This facility in forming the marriage contract by the common and ecclesiastical law, exists in the American states where the common law has not been altered on this point. In the Roman catholic church, by the authority of the council of Trent, marriage was elevated into the dignity of a sacrament, and was clothed with formalities, and made a complicated system. But in France, under the revolutionary constitution of

1791, marriage was declared to be regarded as a mere civil contract. The same principle was adopted in the code Napoleon; and now, says Toullier, the law separates the civil contract entirely from the sacrament of marriage, and does not attend to the forms of the church and the nuptial benediction, which bind only the conscience of the faithful. Marriage valid by the law of the place where it is celebrated is valid every where. The principle is that, with respect to marriage, the *lex loci contractus* prevails over the *lex domicilii*, as being the safer rule, and one dictated by just and enlightened views of international jurisprudence.

14. What are the incidents of marriage respecting property, according to the *jus guentium?*—94

They are drawn by Mr. Justice Story, as follows: 1. That where there is a marriage in a foreign country, and an express nuptial contract concerning personal property, it will be sustained every where, unless it contravenes some positive rule of law or policy. But as to real property, it will be made subservient to the *lex rei sitæ*. 2. Where such a contract applies to personal property, and there is a change afterwards of the matrimonial domicil, the law of the actual domicil will govern as to future acquisitions. 3. If there be no such contract, the matrimonial domicil governs all the personal property everywhere, but not the real. 4. The matrimonial domicil governs as to all acquisitions present and future, if there be no change of domicil. If there be, then the law of the actual domicil will govern as to future acquisitions, and the law *rei sitæ* as to real property. If the marriage takes place in a foreign country *in transitu*, and where the parties had no intention of fixing their domicil, the law of the actual or intended domicil of the parties governs the incidents of the marriage; and it is a general rule that if the husband and wife had different domicils when they married, the domicil of the husband became the true and matrimonial domicil.

LECTURE XXVII.

OF THE LAW CONCERNING DIVORCE.

1. What are the provisions made by the revised statutes of New York, on the subject of divorce?—96

They have authorized the chancellor, on suit before him, by bill, to declare void the marriage contract: 1. If either of the parties, at the time of the marriage, had not obtained the age of legal consent. 2. If the former husband or wife was living and the marriage in force. 3. If one

of the parties was an idiot or lunatic. 4. If the consent of one of the parties was obtained by force or fraud. 5. If one of the parties was physically incapable of entering into the marriage state. All issues upon the legality of a marriage, except where it is sought to be annulled on the ground of physical incapacity of one of the parties, are to be tried by a jury upon a feigned issue.

2. Within what time must the suit be brought for the last cause to annul a marriage?—97

Within two years, and by the party injured.

3. As the law now stands in New York, in what three cases only, can a bill of divorce for adultery be obtained?—98

1. If the married parties are inhabitants of the state, at the time of the commission of the adultery. 2. If the marriage took place in the state, and the party injured be an actual resident at the time of the adultery committed, and at the time of filing the bill. 3. If the adultery was committed in the state, and the injured party, at the time of filing the bill, be an actual inhabitant of the state.

4. What is the punishment of a defendant, if guilty?—98

Disability from re-marrying during the life of the other party.

5. How does it affect children?—99

If the wife be the complainant, the legitimacy of any children of the marriage, born or begotten of her before the filing of the bill, are not to be affected by the decree; and if the husband be the complainant, the legitimacy of the children, born or begotten before the commission of the offence charged, are not to be affected by the decree. The statute further provides, that if the wife be the complainant, the court is to make a suitable allowance, in sound discretion, out of the defendant's property, for the maintenance of her and her children, and compel the defendant to abide the decree. The chancellor is also to give to the wife, being the injured party, the absolute enjoyment of any real estate belonging to her, or of any personal property derived by title through her, or acquired by her industry. If, on the other hand, the husband be the complainant, then he is entitled to retain the same interest in the wife's estate, which he would have if the marriage had continued; and he is also entitled to her personal estate and *choses in action* which she possessed at the time of the divorce, equally as if the marriage had continued; and the wife loses her title to dower, and to a distributive share of her husband's personal estate.

6. In what cases may the court refuse to decree a divorce, though the fact of adultery be established?—101

In the four following: 1. If the offence was committed by the pro-

curement or with the connivance of the complainant. 2. If it has been forgiven, and the forgiveness proved by express proof, or by the voluntary cohabitation of the parties with knowledge of the fact. 3. Where the suit has not been brought within five years after the adultery. 4. Or where the complainant has been guilty of the same offence. The policy of New York has been against divorces from the marriage contracts, except for adultery. The statute authorizes the court of chancery to allow of qualified divorces *a mensa et thoro*, founded on the complaint of the wife, of cruel or inhuman treatment, or such conduct as renders it unsafe or improper for her to cohabit with her husband; or for wilful desertion of her, and refusal or neglect to provide for her. The court may decree a separation from bed and board for ever, or for a limited period, in its discretion, and the decree may be revoked at any time, by the same court by which it was pronounced, under such regulations and restrictions as the court may impose, upon a joint application of the parties, and upon their producing satisfactory evidence of their reconciliation. To entitle the court to sustain a suit, the parties must be inhabitants of the state, and the wife an actual resident at the time of exhibiting the complaint; or the parties must have been inhabitants of the state, at least one year, and the wife an actual resident at the time of filing the bill.

7. What is the effect of a foreign divorce, or how far is a divorce in one state valid in another?—107

The question has never been judicially raised and determined in the United States, and it has generally been considered that the state governments have complete control and discretion in the case. In *Harding* v. *Allen*, (9 *Greenleaf's Rep.*, 140,) it was adjudged by the supreme judicial court in Maine, that a decree of divorce pronounced according to the law of one jurisdiction, and the new relations thereupon formed, ought to be recognized in the absence of all fraud, as operative and binding every where, so far as related to the dissolution of marriage, though not as to other parts of the decree, such as an order for the payment of money by the husband. This is deemed a correct and valuable decision in this country, though contrary to the English rule—which is, that a foreign divorce *a vinculo*, from an English marriage, between parties domiciled in England at the time of such marriage is *null*.

8. What is the effect of a foreign judgment?—118

In cases not governed by the constitution and laws of the United States, the doctrine of the English law on that subject, is generally the law of this country; and there a distinction is taken between a suit brought to enforce a foreign judgment, and a plea of a foreign judgment in bar of a fresh suit for the same cause. No sovereign is obliged to execute, within his dominion, a sentence rendered out of it; and if execution be sought by suit upon the judgment, or otherwise, he is at liberty, in his courts of justice, to examine into the merits of such judgment; for the effect to be given to foreign judgments is altogether a matter of comity, in cases where it is not regulated by treaty. In the former case of a suit

to enforce a foreign judgment, the rule is, that the foreign judgment is to be received, in the first instance, as *prima facie* evidence of the debt, and it lies on the defendant to impeach the justice of it, or show that it was irregularly and unduly obtained. But if the foreign judgment has been pronounced by a court possessed of competent jurisdiction over the cause and the parties, and carried into effect, and the losing party institutes a new suit upon the same matter, the plea of the former judgment is an absolute bar. It is a *res judicata*, which is received as evidence of truth; and the *exceptio rei judicatæ*, as the plea is termed in the civil law, is final. This is a principle of general jurisprudence.

9. What is the effect of a suit pending before another competent tribunal?—122

A *lis pendens*, before the tribunals of another jurisdiction has, in proceedings *in rem*, been held to be a good plea in abatement of a suit. The pendency of the foreign attachment is a good plea in abatement of the suit. But, generally, a personal arrest and holding to bail in a foreign country, cannot be pleaded in abatement; and it is no obstacle to a new arrest and holding to bail for the same cause in the English courts, and they will not take judicial notice of any arrest in a foreign country, or in their own plantations; and the same rule of law has been declared in this country.

LECTURE XXVIII.

OF HUSBAND AND WIFE.

1. Can any contracts at law be made between husband and wife?—129

Not without the intervention of trustees: for she is considered as being *sub potestate viri*, and incapable of contracting with him; and except in special cases, within the cognizance of equity, the contracts which subsisted between them prior to the marriage, are dissolved. The wife cannot convey lands to her husband, though she may release her right of dower to his grantee; nor can the husband convey lands by deed directly to the wife. But the husband may devise lands to his wife, for the instrument is not to take effect until after his death; and by a conveyance to uses, he may create a trust in favour of his wife, and equity will decree a performance of the contract by the husband with his wife, for her benefit.

2. What is the general rule as to the rights and liabilities of the husband?—129

That he becomes, upon the marriage, entitled to all the goods and chattels of the wife, and to the rents and profits of her lands, and he becomes liable to pay her debts, and perform her contracts.

3. What right in the lands of his wife, does the husband acquire by marriage ?—130

If the wife, at the time of marriage, be seised of an estate of inheritance in land, her husband, upon the marriage, becomes seised of the freehold *jure uxoris*.

4. What right does the husband acquire in the life estate of his wife ?—134

Upon the marriage, he becomes seised of such an estate in right of his wife, and is entitled to the profits during the marriage.

5. What if she have an estate during the life of another person who survives her ?—134

The husband becomes a special occupant of the land, during the life of such other person.

6. To whom does the land go after the estate for life is ended ?—134

To the person entitled in reversion or remainder, and the husband, *quasi* husband, has no more concern with it. This estate the husband can only sell or charge to the extent of his interest in it, and his representatives take as emblements the crops growing at his death.

7. What rights has the husband in the chattels real of his wife ?—134

Upon marriage, he becomes possessed of all the chattels real of his wife, as leases for years, and the law gives him power without her, to assign, mortgage, or otherwise dispose of the same as he pleases, by any act in his lifetime ; except it be such an interest as the wife hath, by provision or consent of her husband, by way of settlement. Such chattels real are also subject to be sold under execution for his debts.

8. What if he makes no disposition of them in his lifetime ?—134

He cannot devise the chattels real by will, and the wife, after his death, will take the same in her own right, without being executrix or administratrix to her husband. If he grant, a rent charge, out of the same, without altering the estate, the rent charge becomes void at his death.

9. What property in her chattels real, does the law give him if he survive the wife ?—134

It gives him her chattels real, absolutely by survivorship ; for he was in possession of the chattels real during the coverture, by a kind of joint tenancy with the wife.

10. What is the rule respecting the wife's *choses in action*?—135

That the husband has power to sue for, and recover the same; and when recovered, and reduced to possession, and not otherwise, the money becomes absolutely his own. The rule is the same, if a legacy or distributive share accrues to the wife during coverture. So, he has power to release and discharge the debts, and to change the securities, with the consent of the debtor.

11. What if he dies before he has recovered the money?—135

The wife will be entitled to the debts in her own right, without administering on his estate, or holding the same as assets for his debts.

12. What if the wife dies, and he survives her, before he has reduced the *chose in action* to possession?—135

It does not strictly survive to him; but he is entitled to recover the same to his own use, by acting as her administrator. The husband is entitled *jure mariti*, to administer, and to take all her chattels real, things in action, and every other species of personal property, whether reduced into possession, or contingent, or recoverable by suit.

13. What is the rule as to the wife's debts *dum sola?*—135

That if the wife leaves *choses in action* not reduced into possession during her life, the husband will be liable to that extent; for those *choses in action* will be assets in his hands.

14. What is the rule, where the husband has administered in part on his wife's estate, and dies, and administration *de bonis non* of the wife, by a third person or by the next of kin of the wife is obtained?—136

That such administrator would be deemed as a mere trustee for the representatives of the husband.

15. What if a suit be brought in the joint name of husband and wife to recover the wife's *chose in action*, and he die before he had reduced the property to possession?—138

The wife as survivor would take the benefit of recovery; and it is settled that in a suit in chancery, by the husband, to recover a legacy, or distributive share due the wife, she must be made a party with him, and then the court will require the husband to make a suitable provision for the wife out of the property.

16. How does a general assignment in bankruptcy, or under the insolvent laws, affect the wife's property?—138

It passes her property and *choses in action*, but subject to her right of survivorship; and if the husband dies before the assignees have reduced the property to possession, it will survive to the wife, for the assignees

possess the same rights as the husband before the bankruptcy, and none other.

17. What is the rule in chancery as to the wife's equity to a reasonable provision out of her property, for the support of herself and her children?—139

That if the husband wants the aid of chancery to enable him to get possession of his wife's property, he must do what is equitable, by making a suitable provision out of it for the maintenance of her and her children. Whether the suit for the wife's debt, legacy, or portion, be by the husband or by his assignees, the result is the same, and a proper settlement on the wife must first be made of a proportion of the property. The provision is to be apportioned, not merely to that part of the equitable portion of the wife's estate which the husband seeks, but to the whole of her personal fortune, including what the husband had previously received. The principle is, that chancery will lay hold of the property of the wife, as far as it may be in its power, for the purpose of providing a maintenance for her when she is abandoned by her husband. The wife's equity does not attach, except upon that part of her personal property in action which the husband cannot acquire without the assistance of a court of equity.

18. What is the difference as to *choses in action* belonging to the wife, whether the husband sues in his own name exclusively, or jointly with his wife?—142

The principle of the distinction is, that if he brings the action in his own name alone, (as it is said he may for debt due the wife upon bond, 1 *Vern.* 396. 3 *Lev.* 403,) it is a disagreement to the wife's interest, and implies it to be his intention that it should not survive her. But if he brings the action in their joint names, the judgment is, that they shall both recover, and the debt survives to the wife. The judgment does not alter the property, nor show it to be his intention that it should be altered. *For a summary of the causes, for which the husband may sue alone, and when he must join with his wife*, see 1 *Chitty on Pleading*, 17, 21, *and also Tidd's Prac.* 9.

19. What is the rule of equity in case the husband has made a marriage settlement on his wife, in consideration of her fortune?—142

He is considered in the light of a purchaser of her fortune, and his representatives will be entitled, on his dying in his wife's lifetime, to the whole of her things in action, though not reduced to possession in his lifetime, and though there be no special agreement for that purpose.

20. What is the rule as to the personal property of the wife, which she had in possession at the time of the marriage?—143

That which she had in her own right, and not *en auter droit*, such as money, goods and chattels, and moveables, vest immediately and absolutely

in the husband, and on his death they go to his representatives, as being entirely his property.

21. What is the rule as to the liability of the husband for the wife's debts ?—143

That he is liable for all her debts before coverture ; but if they are not recovered during the coverture, he is discharged. The debts of the wife *dum sola*, are extinguished by the husband's discharge as a bankrupt or insolvent. 2 *Neville & Manning's Rep.* 255.

22. How far is the husband liable for the contracts of his wife during coverture ?—146

The husband is bound to provide his wife with necessaries suitable to his condition in life ; and if she contracts debts due for them during cohabitation, he is obliged to pay those debts ; but for any thing beyond necessaries he is not chargeable. He is bound by her contracts for ordinary purchases, from a presumed assent on his part ; but if his dissent be previously made known, the presumption of his assent is rebutted. If the tradesman furnish goods to the wife, and gives the credit to her, the husband is not liable, though she was at the time living with her husband. Nor is he liable for money lent to the wife, unless his request be averred and shown. So, if the husband makes a reasonable allowance to the wife for necessaries during his temporary absence, and a tradesman, with notice of this, supplies her with goods, the husband is not liable, unless the tradesmen can show, that the allowance was not supplied. If the husband abandons his wife, or they separate by consent, without any provision for her maintenance, or if he sends her away, he is liable for her necessaries, and he sends credit with her to that extent. But if the wife *elope*, though it be not with an adulterer, he is not chargeable even for necessaries. The very fact of elopement and separation, is sufficient to put persons on inquiry, and whoever gives the wife credit afterwards, gives it at his peril. The husband is not liable unless he receives his wife back again. The duties of the wife, while cohabiting with the husband, form the consideration of his liability. He is, accordingly, bound to provide for her in his family ; and while he is not guilty of cruelty, and is willing to provide her a home, and all reasonable necessaries there, he is not bound to furnish them elsewhere.

23. What is the rule where the wife elopes, and repents and returns again, and her husband refuses to receive her ?—147

That he is bound for her necessaries ; but it does not apply where the wife had committed adultery. If a man turns away his wife without justifiable cause, he is bound by her contracts for necessaries suitable to her degree and estate. If they live together, he is bound only by her contracts made with his assent, which may be presumed. If the wife goes beyond what is reasonable and prudent, the tradesman trusts her at his peril.

24. How far is the husband liable for the torts and frauds of the wife committed during the coverture?—149

If committed in his company, or by his order, he alone is liable. If not, they are jointly liable, and the wife must be joined in the suit with her husband. Where the remedy for the tort is only by damages by suit, or fine, the husband is liable with the wife; but if the remedy be sought by imprisonment, on execution, the husband is alone liable to imprisonment. The wife, during coverture, cannot be taken on a *ca. sa.*, for her debt *dum sola*, without her husband; and if he escapes, or is not taken, the court will not let her lie in prison alone. If the tort or offence be punished criminally, by imprisonment, or other corporal punishment, the wife alone is to be punished, unless there be evidence of coercion, from the fact, that the offence was committed in the presence, or by the command of the husband. This indulgence is extended so far as to excuse the wife from punishment for theft committed in the presence, or by the command of her husband.

25. What are the exceptions to the general rule of law, that the wife is incompetent to contract?—150

First, a wife in England, and those states in this country where fines exist, may pass her freehold estate by a fine, and this and a common recovery, were the only ways in which she could, at common law, convey her real estate. She may, by a fine, and a declaration of the uses thereof, declare a use for her husband's benefit. So, if the husband and wife levy a fine, a declaration of the uses by the husband alone, will bind the wife and her heirs, unless she disagrees to the uses during the coverture. If the wife levy a fine as a *feme sole*, without her husband, though it will be good as against her and her heirs, the husband may avoid it during coverture, for the benefit of the wife, as well as for himself. The wife, may, as an attorney to another, convey an estate in the same manner as her principal could, and she may execute a power simply collateral, and, in some cases, a power coupled with an interest, without the concurrence of her husband. She may also transfer a trust estate, by lease and release, as a *feme sole*. The general rule of our American law is, that the wife may convey by deed; that she must be privately examined; that the husband must show his concurrence to the wife's conveyance by becoming a party; and that the cases in which her deed without such concurrence is valid, are to be exceptions to the general rule.

Second, If the husband was banished, or had abjured the realm, it was an ancient and another necessary exception to the general rule of the wife's disability to contract, and if the husband be an alien living abroad, the reason of the exception also applies.

26. How is the rule of law, that a woman cannot hold personal property, independent of her husband, taken in equity?—162

It is not received in equity, and a married woman may, through the medium of a trustee, enjoy property as freely as a *feme sole;* and it is not

unusual to convey or bequeath property to a trustee in trust, to pay the interest or income thereof to the wife to her separate use, free from the debts of her husband, and payable upon her separate order or receipt. In such case, the husband has no interest in the property. It is not necessary that the trustee should be a stranger. The husband himself may be trustee. Gifts from the husband to the wife may be supported, as her separate property, if they be not prejudicial to creditors, even without the intervention of trustees. She may institute a suit by her next friend, against him, and she may obtain an order to defend separately, suits against her.

27. What are the cases in which equity allows a wife to institute a suit against her husband ?—164

When any thing is given to her for her separate use, or her husband refuses to perform marriage articles, or articles for a separate maintenance; or where the wife, being deserted by her husband, hath acquired by her labour a separate property, of which he hath plundered her. The acquisitions of the wife, in such a case, are her separate property.

28. What is the rule as to the obligation of the wife to perform her covenant or warranty ?—168

That, though the wife may convey her estate by deed, she will not be bound by a covenant to levy a fine, or convey her estate. The agreement of a *feme covert*, with the assent of her husband, to sell her estate, is absolutely void at law, and the courts of equity never enforce such a contract against her.

29. What is the rule with respect to antenuptial agreements ?—172

That equity will grant its aid, and enforce a specific performance of them, provided the agreement be fair and valid, and the intention of the parties consistent with the principles and policies of the law. Equity will execute covenants in marriage articles at the instance of any person who is within the influence of the marriage consideration, and in favour of collateral relations.

Settlements after marriage, if made in pursuance of an agreement in writing entered into prior to the marriage, are valid, both against purchasers and creditors. The marriage is, of itself, a valuable consideration for the agreement, and sufficient to give validity to the settlement. Chancery will not carry into execution articles of agreement between husband and wife. The married parties have no power to vary the rights and duties growing out of the marriage contract, or to effect at their pleasure a partial dissolution of the contract.

30. What is the rule, as to the right of the husband or wife, to be a witness for or against each other ?—178

It is a settled principle of law, founded upon public policy, that the husband and wife cannot be witnesses, neither for nor against each other.

Nor can either of them be permitted to give any testimony either in a civil or criminal cases, which goes to criminate the other; and the rule is so inviolable, that no consent will authorize the breach of it. But where the wife acts as her husband's agent, her declarations have been admitted in evidence to charge him. Dying declarations of the wife have been admitted in a civil suit against her husband.

29. What authority may the husband exercise over the person of his wife?—181

As he is guardian of the wife, and is bound to protect and maintain her, the law has given him a reasonable superiority and control over her person, and he may even put gentle restraints upon her liberty, if her conduct be such as to require it. The husband is the best judge of the wants of the family and the means of supplying them, and if he shifts his domicil the wife is bound to follow him wherever he chooses to go.

LECTURE XXIX.

OF PARENT AND CHILD.

1. In what do the duties of parents to their children, as their natural guardians consist?—189

In maintaining and educating them during the season of infancy and youth, and in making reasonable provision for their future usefulness and happiness in life, by a situation suited to their habits, and a competent provision for the exigencies of that situation.

2. How far is the parent bound by law to provide for the child?—190

Until the latter is in a condition to provide for its own maintenance, and the obligation extends no further than to necessary support. The obligation of the father to maintain his child, ceases as soon as the child comes of age, however wealthy the father may be, unless the child becomes chargeable to the public as a pauper, and the statute extends only to relations by blood, and the husband is not liable for the expenses of the maintenance of the child of the wife by a former husband, nor for the expense of the maintenance of the wife's mother; if he takes the child to his house he is liable as father. The father is entitled to the custody of the persons of his children, and to the value of their labour during their minority. He may also maintain trespass for a tort to an infant child, provided he can show a loss of services, for that is the *gist* of the action by the father.

3. What are the duties of children to their parents?—207

Obedience and assistance during their own minority, and gratitude and reverence during the rest of their lives.

4. What where the Athenian and Roman laws on the subject of parents supporting their children?—207

They where so strict in enforcing the performance of this natural duty, that they would not allow the father to disinherit the child from passion or prejudices, but only for substantial reasons, to be approved of by a court of justice.

5. How were the duties of children to their parents enforced by the Athenians?—207

Solon ordered all persons, who refused to make due provisions for their parents, to be punished with infamy; and the same penalty was incurred for personal violence towards them.

6. How does the law consider an illegitimate child?—212

As *nullius filius*, or as the civil law, from the difficulty of ascertaining the father, equally concluded, *patrem habere non intelliguntur*, he has no inheritable blood. A bastard is incapable of inheriting as heir, either to his putative father or his mother, or any one else, nor can he have heirs but of his own body.

LECTURE XXX.

OF GUARDIAN AND WARD.

1. How many kinds of guardianship are there?—216

There are two: one by the common law and one by the statute.

2. How many kinds of guardianship were there at the common law?—217

Three; viz., guardian by nature, guardian by nurture, and guardian in socage.

3. Who is guardian by nature?—218

The father.

4. If the father died, who was the guardian?—217

The mother.

5. How far does this guardianship extend?—221

It extends only to the custody of the person of the child, until the age of twenty-one years, and it yielded to guardianship in socage.

6. What is the extent of guardianship by nurture?—221

It extends only to the person, and determines when the infant arrives at the age of fourteen, in the case both of males and females. This guardianship is said to apply only to younger children, who are not heirs apparent; and as all the children inherit equally under our laws, it would seem that this species of guardianship has become obsolete.

7. What authority has the guardian in socage?—222

He has the custody of the infant's lands, as well as his person. It applies only to lands which the infant acquires by descent; and the common law gave this guardianship to the next of blood to the child, to whom the inheritance could not possibly descend; and therefore, if the land descended to the heir on the part of the father, the mother, or next relation on the part of the mother, had the wardship; and so if the land descended to the heir on the part of the mother, the father, or his next of blood, had the wardship.

8. When do guardians in socage cease?—222

When the child arrives at the age of fourteen years, for he is then entitled to elect his own guardian, and oust the guardian in socage, who is then accountable to the heir for the rents and profits of the estate.

9. What if the infant does not elect a guardian?—222

The guardian in socage continues.

10. On what are testamentory guardians founded?—224

On the deed, or last will of the father, and they supercede the claims of any other guardian.

11. Who are chancery guardians?—226

Guardians appointed by the court of chancery, or other tribunals, having jurisdiction in testamentary matters. The chancery guardian, continues until the majority of the infant, and is not controlled by the election of the infant when he arrives at the age of fourteen.

12. In whom does the general jurisdiction over guardians reside?—227

In the court of chancery; but they may be cited and compelled to

appear, before the surrogate, but his powers in these respects are not final.

13. What is the practice in chancery on the appointment of a guardian? —227

The practice is to require a master's report approving of the person and security offered. The court may, in its discretion, appoint one person guardian of the person, and another guardian of the estate, in like manner as in cases of lunatics and idots, there may be one committee of the person, and another of the estate. The guardian or committee of the estate, always is required to give adequate security, but the committee of the person gives none.

14. What are the legal responsibilities of a guardian to his ward?—229

His trust is one of obligation and duty, and not of speculation and profit. He cannot reap any benefit from the use of his ward's money. He cannot act for his own benefit in any contract, or purchase, or sale, as to the subject of the trust. If he settles a debt upon beneficial terms, or purchases it at a discount, the advantage is to accrue entirely to the infant's benefit. He is liable to an action of account at common law, by the infant, after he comes of age; and the infant, while under age, may, by his next friend, call the guardian to account by a bill in chancery. Every guardian is bound to keep safely the personal estate of his ward, and to account for the personal estate, and for the issues and profits of the real estate; and if he suffers any waste, sale or destruction of the inheritance, he is liable to be removed, and to answer in treble damages. If the guardian has been guilty of negligence in the keeping or disposition of the infant's funds, whereby the estate has incurred a loss, the guardian will be obliged to sustain that loss. If the guardian puts the ward's money in trade, the ward will be entitled to elect to take the profits of the trade, or the principal, with compound interest, to meet those profits when the guardian will not disclose them. So, if he neglects to put the ward's money at interest, but negligently suffers it to lie idle, or mingles it with his own, the court will charge him with simple interest, and in cases of gross delinquency, with compound interest. These principles apply to trustees of every kind.

LECTURE XXXI.

OF INFANTS.

1. From what does the necessity of guardians result, and how long does this inability continue in contemplation of law?—232

It results from the inability of infants to take care of themselves; and it continues in contemplation of law, until the infant has attained the age of twenty-one years. The age of twenty-one is the period of majority for both sexes, according to the English common law, and that age is completed on the day preceding the anniversary of the person's birth. The age of twenty-one is probably the period of absolute majority throughout the United States, though female infants, in some of them, have enlarged capacity to act at the age of eighteen. In Ohio, females are deemed of full age in respect to contracts, at the age of eighteen. Louisiana and France follow in this respect the common law period of limitation, though entire majority by the civil law, as to females as well as males, was not until the age of twenty-five; and Spain and Holland follow, as to males, the rule of the civil law. Nor can infants do any act to the injury of their property, which they may not avoid, or rescind, when they arrive at full age. The responsibility of infants for crimes by them committed, depends less on their age, than on the extent of their discretion and capacity to discern right and wrong.

2. What acts are binding on infants?—239

Contracts for necessaries are binding upon an infant, and he may be sued and charged in execution on such a contract, provided the articles were necessary for him under the circumstances and condition in which he was placed.

3. How is the question of necessaries governed?—239

By the real circumstances of the infant, and not by his ostensible situation; and, therefore, the tradesman who trusts him is bound to make due inquiry, and if the infant has been properly supplied by his friends, the tradesman cannot recover. Lord Coke considers the necessaries of the infant to include victuals, clothing, medical aid, and "good teaching or instruction, whereby he may profit himself afterwards."

4. If the infant lives with his father, or guardian, and their care and protection are duly exercised, can he bind himself even for necessaries?—239

He cannot.

5. Is infancy permitted to protect fraudulent acts?—240

No, it is not; and therefore, if an infant takes an estate, and agrees to pay rent, he cannot protect himself from the rent, by pretence of infancy, after enjoying the estate, when of age. If he receives rents, he cannot demand them again when of age according to the doctrine as now understood. If an infant pays money on his contract, and he enjoys the benefit of it, and then avoids it when he comes of age. he cannot recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age, on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield, not as a sword. He cannot have the benefit of the contract on one side, without returning the equivalent on the other. But there are many hard cases in which the infant cannot be held bound by his contracts, though made in fraud; for infants would lose all protection if they were to be bound by their contracts made by improper artifices, in the heedlessness of youth, before they had learned the value of character, and the just obligation of moral duties. Where an infant had fradulently represented himself to be of age when he gave a bond, it was held that the bond was void at law. But where he obtained goods upon his false and fraudulent affirmation that he was of age, though he avoided payment of the price of the goods, on the plea of infancy, the vendor was held entitled to reclaim the goods, as having never parted with his property in them; and it has been suggested, in another case, that there might be an instance of such gross and palpable fraud, committed by an infant arrived at the age of discretion, as would render a release of his right to land binding upon him. Infants are liable in actions arising *ex delicto*, whether founded on positive wrongs, as trespass or assault; or constructive torts, or frauds. But the fraudulent act, to charge him, must be wholly tortious; and a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover, or case, by a change in the form of the action. He is liable in trover for tortiously converting goods intrusted to him; and in detinue, for goods delivered upon a special contract for a specific purpose; and in *assumpsit*, for money, which he has fraudulently embezzled.

6. If an infant be made a defendant in equity, at the suit of a creditor, will the answer of the guardian *ad litem*, be binding or conclusive?—245

No, it will not.

7. How will such an answer in chancery *pro forma*, leave the plaintiff?—245

It leaves the plaintiff to prove his case, and throws the infant upon the protection of the court.

8. What was the maxim of the Roman law in this respect?—245

It was the maxim of the Roman law, that an infant was never presumed to have done an act to his prejudice, *pupillus pati posse non intelligitur*. In decrees against an infant there is, according to the old and settled rule of practice in chancery, a day given him when he comes of age,

usually six months, to show cause against the decree, and make a better defence, and he is entitled to be called in for that purpose by process of *subpœna*. The decree in ordinary cases would be bad *on the face of it*, and ground for a bill of review, if it omitted to give the infant a day to show cause after he came of age; though Lord Redesdale held, in *Bennett* v. *Hamill*, that such an error in the decree would not affect a *bona fide* purchase at a sale under it. But in the case of decrees for the foreclosure and sale of mortgaged premises, or for the sale of lands under a devise to pay debts, the infant has no day, and the sale is absolute. In the case of a strict foreclosure of the mortgagor's right without a sale, the infant has his day after he comes of age, but then he is confined to showing errors in the decree, and cannot unravel the accounts, nor redeem.

LECTURE XXXII.

OF MASTER AND SERVANT.

1. What are the several kinds of persons that come within the description of servants?—246

1. Slaves. 2. Hired servants. 3. Apprentices.

2. How, according to the Institutes of *Justinian*, might a person become a slave?—246

In three ways:—1. By birth when the mother was a slave. 2. By captivity in war. 3. By the voluntary sale of himself as a slave, by a freeman, above the age of twenty, for the purpose of sharing the price.

3. How is the relation of master and servant, of the second class formed?—258

By contract. The one is bound to render service, and the other to pay a stipulated consideration. But if the servant hired for a definite period, leaves the service before the end of it, without reasonable cause, or is dismissed for justifiable cause, he loses his right to wages for the period he has served.

4. For what cause may a servant be dismissed?—259

Either for immoral conduct, wilful disobedience, or habitual neglect.

5. What is the rule with respect to the obligation of the master for the acts and contracts of his servant?—259

That, the master is bound by the act of his servant, either in respect to contracts or injuries, when the act was done by authority of the master. If the servant does an injury fraudulently, while in the immediate employ of his master, the master, as well as the servant, has been held liable in damages; and he is also said to be liable if the injury proceeds from negligence, or want of skill in the servant, for it is the duty of the master to employ servants who are honest, skilful, and careful.

6. What is the rule as to liability of the master, if the servant employs another servant to do his business?—260

If the servant so employed, be guilty of an injury, the master is liable. But to render this rule applicable, the nature of the business must be such as to require the agency of subordinate persons, and then there is an implied authority to employ such persons. A servant may justify a battery in the necessary defence of his master.

7. What persons come under the description of apprentices?—261

Persons who are bound to service for a term of years, to learn some art or trade. They are the subject of statute regulations in almost, if not quite, every state in the Union, or perhaps in Europe.

LECTURE XXXIII.

OF CORPORATIONS.

1. What is a corporation?—267

A corporation is a franchise possessed by one or more individuals, who subsist as a body politic, under a special denomination, and vested by the policy of the law, with the capacity of perpetual succession, and of acting, in several respects, however numerous the association may be, as a single individual.

2. What is the object of this institution?—267

To enable the members to act by one united will, and to continue their joint powers and property in the same body, undisturbed by the change of members, and without the necessity of perpetual conveyances, as the rights of members pass from one individual to another. All the individuals composing a corporation, and their successors, are considered in law but as one moral person, capable, under an artificial form, of taking and conveying property, contracting debts and duties, and of enjoying a

variety of political and civil rights. One of the peculiar properties of a corporation, is the power of perpetual succession; for, in judgment of law, it is capable of idefinate duration. The rights and privileges of a corporation do not determine, or vary, upon the death or change of any individual members. They continue as long as the corporation endures.

3. For what purpose were corporations invented?—268

It was chiefly for the purpose of clothing bodies of men in succession, with the qualities and capacities of one single, artificial, and fictitious being, that they were originally invented, and for the same convenient purpose, they have been brought largely into use.

4. How far back may we trace the history of corporations?—268

They were well known to the Roman law, and they existed from the earliest periods of the Roman republic. It would appear, from a passage in the Pandects, that they were copied from the laws of Solon, who permitted private companies to institute themselves at pleasure, provided they did nothing contrary to public law. But the Romans were not so indulgent as the Greeks. They were very jealous of such combinations of individuals, and they restrained those that were not specially authorized; and every corporation was illicit that was not ordained by the decree of the senate, or of the emperor. In the age of Augustus, as we are informed by Suetonius, certain corporations had become nurseries of faction and disorder, and that emperor interposed, as Julius Cæsar had done before him, and dissolved all but ancient and legal corporations. We find, also, in the younger Pliny, a singular instance of the extreme jealousy indulged by the Roman government of these corporations. A destructive fire in Nicomedia, induced Pliny to recommend to the emperor Trajan, the institution, for that city, of a fire company of 150 men, (*collegium fabrorum*,) with an assurance, than none but those of that business should be admitted into it, and that the privileges granted them should be extended to no other purpose. But the emperor refused the grant, and observed, that societies of that sort had greatly disturbed the peace of the cities; and that whatever name he gave them, and for whatever purpose they might be instituted, they would not fail to be mischievous.

5. How are the powers and capacities of corporations considered under the English law?—269

They very much resemble those under the civil law; and it is evident, the principles applicable to corporations under the former, were borrowed from the Roman law, and from the policy of the municipal corporations established in Britain and the other Roman colonies, after these countries had been conquered by the Roman arms. Under the latter system, corporations were divided into ecclesiastical and lay, civil and eleemosynary.

6. Under what disabilities were they placed?—269

They could not purchase, or receive donations of land, without license, nor could they alienate without just cause. They could only act by attorney; and the act of the majority bound the whole; and they were dissolved by death, surrender, or forfeiture.

7. When did corporations for the advancement of learning come into use?—270

Not until about the 13th century, though they may be said to have existed in an imperfect form, at a much earlier period.

8. About what time were civil or municipal corporations established in Europe, for political and commercial purposes?—271

Cities, towns, and fraternities, were invested with corporate powers and privileges, and with a large share of civil and criminal jurisdiction; in the early periods of the history of modern Europe. These immunities were sought after from a spirit of liberty as well as monopoly, and created as barriers against feudal tyranny. They afforded protection to commerce and the mechanic arts, and formed some counterpoise to the exorbitant powers, and unchecked rapacity of the feudal barons. By this means, order and security, trade, and the arts revived in Italy, France, Germany, Flanders, and England. But although corporations were found to be very beneficial in the earlier periods of modern European history, in keeping alive the spirit of liberty, and in sustaining and encouraging the efforts for social and intellectual improvement, their exclusive privileges have too frequently served as monopolies, checking the free circulation of labour, and enhancing the price of the fruits of industry. Dr. Smith does not scruple to consider them, throughout Europe, as generally injurious to the freedom of trade, and the progress of improvement.

9. How are corporations divided in the United States?—273

Into aggregate and sole.

10. What is a corporation sole?—273

It consists of a single person, who is made a body corporate and politic, in order to give him some legal capacities and advantages, and especially that of perpetuity, which, as a natural person, he cannot have. A bishop, dean, parson, and vicar, are given in the English books, as instances of sole corporations.

11. What are corporations aggregate?—274

The union of two or more individuals in a body politic, with capacity of succession and perpetuity.

12. What kind of corporations are most in use?—274

Aggregate corporations are most in use with us.

13. What is meant by ecclesiastical corporations ?—274

They are those of which the members are spiritual persons, and the object of the institution is also spiritual. With us, they are called religious corporations.

14. How are lay corporations divided ?—274

Into eleemosynary and civil.

15. What is an eleemosynary corporation ?—274

It is a private charity, constituted for the perpetual distribution of alms. In this class may be ranked, hospitals for the relief of poor, sick, and impotent persons, and colleges and academies established for the promotion of learning, and endowed with property, by public and private donations.

16. How are civil corporations divided ?—275

Into private and public.

17. What are public corporations ?—275

Such as are created by government for political purposes, as counties, cities, towns, and villages. A bank created by the government, for its own uses, and where the stock is exclusively owned by the government, is a public corporation. So, is a hospital created and endowed by the government, for general purposes. But a bank, whose stock is owned by private persons, is a private corporation, though its objects and operations partake of a public nature, and though the government may become a partner in the association by sharing with the corporators in the stock.

18. What are the ordinary powers of a corporation ?—277

1. To have perpetual succession, and, of course, the power of electing members in the room of those removed by death or otherwise. 2. To sue and be sued, and to grant and receive, by their corporate name. 3. To purchase and hold lands and chattels. 4. To have a common seal. 5. To make by-laws for the government of the corporation. 6. The power of a motion, or removal of members.

19. What are *quasi* corporations ?—278

Persons who are invested with a corporate capacity for particular specified ends ; as overseers of the poor, commissioners of highways, and trustees of common schools, are invested with corporate attributes *sub modo*.

20. What is the modern doctrine respecting corporate powers ?—298

It is to consider corporations as having such powers as are specifi-

cally granted by the act of incorporation, or as necessary for the purpose of carrying into effect the powers expressly granted, and not as having any other. This is the declared doctrine of the supreme court of the United States.

LECTURE XXXIV.

OF THE HISTORY, PROGRESS, AND ABSOLUTE RIGHTS OF PROPERTY.

1. What is the natural and original method of acquiring property? —318

Occupancy. There is no person, even in his rudest state, who does not feel and acknowledge, in a greater or less degree, the justice of this title. The right of property, founded upon occupancy, is suggested to the human mind, by feeling and reason, prior to the influence of positive institutions. There have been modern theorists, who have considered separate and exclusive property, as the cause of injustice, and the unhappy result of government and artificial institutions. But human society would be in a most unnatural and miserable condition, if it were possible to be instituted or reorganized upon the basis of such speculations. The sense of property is graciously bestowed upon mankind, for the purpose of rousing them from sloth, and stimulating them to action. It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the productions of taste, the erections of charity, and the display of the benevolent affections.

LECTURE XXXV.

OF THE NATURE AND VARIOUS KINDS OF PERSONAL PROPERTY.

1. Of what does personal property usually consist?—341

It usually consists of things temporary and moveable, but it includes all subjects of property not of a freehold nature, nor descendible to the heirs at law.

2. What is a chattel ?—342

Chattel is a very comprehensive term in our law, and includes every species of property, which is not real estate, or freehold.

3. What is the most leading division of personal property ?—342

Into chattels real, and personal.

4. What are chattels real ?—342

Chattels real, concern the reality, as a lease for years of land ; and the duration of the term of the lease is immaterial, provided it be fixed and determinate, and there be a reversion or remainder in fee in some other person.

5. How is property in chattels personal, divided ?—347

Into absolute and qualified.

6. What does absolute property in a thing denote ?—347

Full and absolute dominion over it. Qualified property denotes a special interest, liable to be totally divested on the happening of some particular event.

7. In what may a qualified property subsist ?—347

It may subsist by reason of the nature of the thing or chattel possessed, or from the nature of the title by which it is held. The elements of air, light, and water, are the subjects of qualified property by occupancy. Animals *feræ naturæ*, so long as they are reclaimed by the art and power of man, are the subjects of qualified property ; but when they return to their natural liberty and ferocity, without the *animus revertendi*, the property in them ceases. A qualified property in goods subsists by reason of the title, when they are bailed, pledged, or distrained. Personal property may be held by two or more persons in joint tenancy, or in common ; and, in the former case, the same principle of survivorship applies which exists in the case of a joint tenancy in lands.

8. What are things in action ?—351

They are personal rights not reduced to possession, but recoverable by suit at law. Money due on bond, note, or other contract, damages due for breach of covenant, for the detention of chattels, or for torts, are included under this general head or title to things in action.

9. May chattels be limited over by way of remainder after a life interest in them is created ?—352

Yes ; but not after a gift of the absolute property. The limitation may be either by will or deed.

LECTURE XXXVI.

OF TITLE TO PERSONAL PROPERTY, BY ORIGINAL ACQUISITION.

1. What is the modern rule as to the original acquisition of goods by occupancy?—356

The title by occupancy is becoming almost extinct, under civilized governments, and it is permitted to exist only in those few special cases, in which it may be consistent with public welfare. Such as in case of goods casually lost by the owner, and unreclaimed or designedly abandoned by him.

2. What is the rule as to the acquisition of property by accession?—360

That property in goods and chattels may be acquired by accession; and under that head is also included the acquisition of property proceeding from the admixture or confusion of goods.

3. How is the right of accession defined in the French civil code?—360

It is defined to be the right to all which one's own property produces, whether that property be moveable or immoveable, and the right to that which is united to it by accession, either naturally or artificially. The fruits of the earth, produced naturally, or by human industry, the increase of animals, and the new species of articles made by one person out of the materials of another, are all embraced in this definition; as if a person hires for a limited period, a flock of sheep, or cattle, of the owner, the increase of the flock, during the term, belongs to the usufructuary, who is regarded as the temporary owner. The Roman law made a distinction as to the offspring of slaves, and so does the civil code of Louisiana.

4. What is the rule in the case of the confusion of goods?—364

With respect to the case where goods of two persons are so intermixed that they can no longer be distinguished, each of them has an equal interest in the subject as tenants in common, if the intermixture was by consent. But if it was wilfully made without mutual consent, then the civil law gave the whole to him who made the confusion, and compelled him to make satisfaction in damages to the other party for what he had lost. The common law, gave the entire property, without any account, to him whose property was originally invaded, and its distinct character destroyed. But this rule is carried no further than necessity requires. It is for the party guilty of the fraud to distinguish his property satisfactorily.

5. What description of property is acquired by intellectual labour ?—365

Literary property, such as maps, charts, writings, and books; and mechanical inventions, consisting of useful machines or discoveries, produced by the joint result of intellectual and manual labour.

6. What provisions have congress made in relation to patent rights for inventions ?—366

That any person, being a citizen of the United States, and any alien, who, at the time of his application, shall be a resident of the United States, and who hath invented any new and useful art, machine or manufacture, or composition of matter, or any new and useful improvement on the same, not known or used before the application, may apply to the secretary of state, for a patent, for the exclusive right of making, constructing, using, and vending, for fourteen years, his invention or discovery. The applicant must make oath, or affirmation, that he believes he is the true inventor or discoverer of the art, machine, or improvement; and must give a written description of his invention, and of the manner of using it, or of the process of compounding the same, in full, clear, and intelligible terms; and accompany it with drawings, and references, and specimens, and models, according to the nature of the case; and cause the same to be attested and filed in the secretary's office. The legal representatives and devisees of a person entitled to a patent, and who dies before it is obtained, may procure it.

7. What is provided in relation to the copy-rights of authors ?—273

That the authors of books, maps, charts, and musical compositions, and the inventors and designers of prints, cuts, and engravings, being citizens of the United States, or residents therein, are entitled to the exclusive right of printing, reprinting, publishing, and vending them, for the term of twenty-eight years, from the time of recording the title thereof; and if the author, inventor, or designer, or any of them, where the work was originally composed and made by more than one person, be living, and a citizen of the United States, or resident therein, at the end of the term, or, being dead, shall have left a widow, or child or children, either or all of them living, she or they are entitled to the same exclusive right for the further term of fourteen years, on complying with the terms prescribed by the act of congress. Those terms are, that the author or proprietor, before publication, deposit a printed copy of the title of the book, map, chart, musical composition, print, cut, or engraving, in the clerk's office of the district wherein he resides, and which copy is to be recorded; and that he cause to be inserted on the title-page, or the next following, of each and every edition of the book, and cause to be impressed on the face of the map, chart, musical composition, print, cut, or engraving, or upon the title or frontispiece of a volume of the same, the following words, "Entered according to the act of congress, in the year ——, by A. B., in the clerk's office of the district court of ——," (as the case may be.) He is then, within three months after publishing the book or other work as aforesaid, to cause to be delivered a copy of the same to the clerk of the said

district court, who is once in every year to transmit a certified list of all such records of copy-right, and the several books or other works deposited as aforesaid, to the secretary of state, to be preserved in his office. The violation of the copy-right thus duly secured, is guarded against by adequate penalties and forfeitures.

On the renewal of the copy-right, the title of the work must be recorded, and a copy of the work delivered to the clerk of the district, and the entry of the record noticed as aforesaid at the beginning of the work; and all these regulations must be complied with, within six months before the expiration of the first term. And in addition to these regulations, the author or proprietor, must, within two months from the date of the renewal, cause a copy of the record thereof to be published in one or more of the public newspapers in the United States, for the space of four weeks.

LECTURE XXXVII.

OF TITLE TO PERSONAL PROPERTY BY TRANSFER BY ACT OF LAW.

1. In what cases may goods and chattels change owners by act of law? —385

In cases of forfeiture, succession, marriage, judgment, insolvency, and intestacy.

2. In what case does the right to property by forfeiture, take place in this country?—385

In New York it is confined to the case of treason; and in that case continues only during the life of the person convicted, and the rights of third persons, existing at the time of the commission of the treason, are saved. The right, so far as it exists in this country, depends probably, upon local statute law; and the tendency of public opinion has been to condemn forfeiture of property, at least in cases of felony. Forfeiture of estate and corruption of blood, under the laws of the United States, and including cases of treason, are abolished.

3. In what case may title to property be acquired by judgment?—387

In case of recovery by law, in an action of trespass or trover of the value of a specific chattel, of which the possession has been acquired by tort, the title to the goods is altered by the recovery, and is transferred to the defendant.

4. What is the rule as to the acquisition of title by bankruptcy or insolvency ?—390

That the bankrupt's estate, as soon as an act of bankruptcy committed, becomes a common fund for the payment of his debts, and he loses the character and power of a proprietor over it.

5. What has the constitution of the United States prescribed in relation to bankruptcies ?—390

It has given to congress the power to establish uniform laws on the subject of bankruptcies throughout the United States. States may enact insolvent laws, provided they do not impair the obligation of contracts, nor effect the rights of the citizens of other states.

6. In what case is title to property acquired by intestacy ?—408

When a person dies, leaving personal property undisposed of by will, and in that case, the personal estate, after the debts are paid, is distributed to the widow, and among the next of kin.

7. What is the rule of distribution of personal estate ?—420

That after the debts are paid, a just and equal distribution of what remaineth clear, of the goods and personal estate of the intestate, shall be made amongst the wife and children or children's children, if any there be ; or otherwise to the next of kin to the intestate, in equal degree, or legally representing their stocks ; that is to say, one-third part of the surplusage to the wife of the intestate, and all the residue by equal portions, to and amongst the children of the intestate, and their representatives, if any of the children be dead, other than such child or children who have any estate by settlement, or shall be advanced by the intestate in his lifetime, by portion equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made. And if the portion of any child who hath had such settlement or portion, be not equal to the share due to the other children by the distribution, the child so advanced is to be made equal with the rest. If there be no children, or their representatives, one moiety of the personal estate of the intestate, goes to the widow, and the residue is to be distributed equally among the next of kin.

7. How are the next of kin determined ?—422

By the rule of the civil law ; and under that rule the father stands in the first degree, and the grandfather and the grandson in the second ; and in the collateral line, the computation is from the intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person. The distribution of personal property, of intestates, in these United States, has undergone considerable modification. In many of them, the English statute of distribution, as to personal property, is pretty closely followed. In a majority of the states, the

descent of real and personal property is to the same persons and in the same proportions, and the regulation is the same in substance, as the English statute of distributions, with the exception of the widow, as to the real estate, who takes one-third for life only, as dower.

8. What is the rule where the place of the domicil of the intestate, and the place of the situation of the property is different?—429

That the disposition, succession to, and the distribution of personal property, wherever situated, is governed by the law of the country of the owner's or intestate's domicil.

LECTURE XXXVIII.

OF TITLE TO PERSONAL PROPERTY BY GIFT.

1. What two kinds of gifts are there?—438

1. Gifts, simply so called, or gifts *inter vivos*. 2. Gifts *causa mortis*, or those made in apprehension of death. Gifts *inter vivos* have no reference to the future, and go into immediate and absolute effect. Delivery is essential, both at law and in equity, to the validity of a parol gift of a chattel; and it is the same whether it be a gift *inter vivos*, or *causa mortis*. The subject of the gift must be certain, and there must be the mutual consent or concurrent will of both parties.

2. How do gifts affect creditors?—440

They do not affect the rights of creditors, as gifts of goods and chattels, as well as of lands, by writing or otherwise, made with intent to delay, hinder and defraud creditors, are void, as against the person to whom such fraud would be prejudicial.

3. What is the rule as to the revocation of gifts?—444

That gifts *inter vivos*, are irrevocable, but that gifts *causa mortis*, are conditional and revocable.

LECTURE XXXIX.

OF CONTRACTS.

1. What is an executory contract?—449

It is an agreement of two or more persons, upon a sufficient consideration, to do or not to do a particular thing.

2. Into what classes are contracts divided?—450

Into contracts under seal and not under seal. If under seal, it is denominated a specialty, and if not under seal, an agreement by parol; and the latter includes equally verbal and written contracts not under seal. The agreement conveys an interest either in possession or in action.

3. What is the distinction between a contract *executed* and a contract *executory?*—450

It is this, as if, for instance, one person sells and delivers goods to another for a price paid, the agreement is *executed*, and becomes complete and absolute; but if the vendor agrees to sell and deliver at a future time, and for a stipulated price, and the other party agrees to accept and pay, the contract is *executory*, and rests in action merely. There are also *express* and *implied* contracts. The former exist when the parties contract in express words, or by writing; and the latter are those contracts which the law raises.

4. What qualifications of the parties are essential, to render a contract valid?—450

That they have sufficient understanding, and age, and freedom of will, and of the exercise of it, for the given case.

5. What is the rule as regards lunatics?—450

The contracts of lunatics are generally void, from the period at which the inquisition finds the lunacy to have commenced. But the inquisition is not conclusive evidence of the fact; and the party affected by the allegation of lunacy may gainsay it by proof, without first traversing the inquisition. The general rule is, that sanity is to be presumed until the contrary be proved; and when an act is sought to be avoided, on the ground of mental imbecility, the proof of the fact lies upon the person who alleges it.

6. How may intoxication affect a contract?—252

It has been decided, that an obligation, executed by a man when deprived of the exercise of his understanding by intoxication, was voidable

by himself, though the intoxication was voluntary, and not procured through the circumvention of the other party.

7. What is the rule as to a general imbecility of mind?—452

That imbecilty of mind is not sufficient to set aside a contract, when there is not an essential privation of the reasoning faculties, or an incapacity of understanding and acting in the ordinary affairs of life. This incapacity is now the test of that unsoundness of mind which will avoid a deed at law. Weakness of understanding may, however, be a material; circumstance in establishing an inference of unfair practice or imposition, and it would naturally awaken the attention of a court of justice to every unfavourable appearance in the case. Nor is a person born deaf and dumb deemed absolutely *non compos mentis*, though by some of the ancient authorities he was deemed incompetent to contract.

8. How are contracts made abroad, to be construed in the courts of justice in this country?—454

The rule is, that a contract, valid by the law of the place where it was made, is valid everywhere. The *lex loci contractus* controls the nature, construction, and validity of the contract. The doctrine of the *lex loci* is replete with subtle distinctions and embarrassing questions, which have exercised the skill and learning of the earlier and most distinguished civilians of the Italian, French, Dutch and German schools, in their discussions on highly important topics of international law. These topics were almost unknown in the English courts, prior to the time of Lord Hardwicke and Lord Mansfield; and the English lawyers seem generally to have been strangers to the discussions on foreign law by the celebrated jurists of continental Europe. In the works of the civilians, the application of the *lex loci* on the one hand, and the *lex fori* or *rei sitæ* on the other, is made to depend on the distinction between real and personal statutes. A *personal statute* is a law, ordinance, regulation or custom, the disposition of which effects the person, and clothes him with capacity or incapacity, which he does not change with every change of abode; but which, upon principles of justice and policy, he is assumed to carry with him wherever he goes. *Real statutes* affect things as used in contradistinction to persons; and their operation is necessarily confined within territorial limits, or *ad locum rei citæ*. Merlin gives the following distinction: that the laws which regulate the condition, capacity or incapacity of persons, are personal statutes; and those which regulate the quality, transmission, and disposition of property, are real statutes. The doctrine in question may be considered, 1. In its application to the obligation and construction of contracts; 2. In its application to the remedy. 1. There is no doubt of the truth of the general proposition, that the laws of a country have no binding force beyond its territorial limits; and their authority is admitted in other states, not *ex proprio vigore*, but *ex comitate*. Every independent community will judge for itself, how far the *comitas inter communitates* is to be permitted to interfere with its domestic interests and policy. There are, however, certain general rules in respect to the

admission of the *lex loci contractus*, to which we may confidently appeal, as being of commanding influence in the consideration of the subject. Thus, it may be laid down as the settled doctrine of public law, that personal contracts are to have the same validity, interpretation, and obligatory force in every other country, which they have in the country where they were made. The interpretation of the contract is to be governed by the law of the country where the contract was made ; but the mode of suing, and the time of suing, must be governed by the law of the country where the action is brought. Remedies upon contracts and their incidents are regulated and pursued according to the law of the place where the action is instituted, and the *lex loci* has no application.

9. What is a *nudum pactum ?*—463

It is a contract without a consideration and not binding in law, though it may be in point of conscience ; and this maxim of the common law, was taken from the civil law, in which the doctrine of consideration is treated with an air of scholastic subtlety. Whether the agreement be verbal or in writing, it is still a *nude pact*, and will not support an action, if a consideration be wanting. The rule, that a consideration is necessary to the validity of a contract, applies to all contracts not under seal, with the exception of bills of exchange and negotiable notes, after they have been negotiated and passed into the hands of an innocent endorsee.

10. What is a valuable consideration ?—465

It is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. Any damage, or suspension, or forbearance of right, will be sufficient to sustain the promise. A mutual promise amounts to a sufficient consideration, provided the mutual promises be concurrent in point of time ; and in that case the one promise is a good consideration for the other. But if two concurrent acts are stipulated, as delivery by one party, and payment by the other, no action can be maintained by either, without showing a performance, or what is equivalent to a performance, of his part of the agreement. If the consideration be wholly past, and executed before the promise be made, it is not sufficient, unless the consideration arose at the instance or request of the party promising ; and the consideration must have been beneficial to one or the other. The consideration must not only be valuable, but it must be lawful, and not repugnant to law, or sound policy, or good morals.

11. What is a sale ?—468

It is a contract for the transfer of property from one person to another, for a valuable consideration, and three things are requisite to its validity, viz. the thing sold, which is the object of the contract, the price, and the consent of the contracting parties.

12. What is the rule in every sale of a chattel, if the possession be in another, and there be no covenant or warranty of title ?—478

The rule of *caveat emptor* applies, and the party buys at his peril.

But if the seller has possession of the article, and he sells it as his own, and not as the agent for another, and for a fair price, he is understood to warrant the title.

13. Is the seller bound to answer for the quality or goodness of the thing sold ?—478

He is not, except under special circumstances, unless he expressly warranted the goods to be sound and good, or unless he hath made a fraudulent representation, or used some fraudulent concealment concerning them, and which amounts to a warranty in law.

14. Is a mere false assertion of value where no warranty is intended, ground of relief to a purchaser ?—485

It is not; because the assertion is a matter of opinion, which does not imply knowledge, and in which men may differ. Every person reposes at his peril on the opinion of others, when he has an equal opportunity to form and exercise his own judgment. An action will lie against a person not interested in the property, for making a false and fraudulent representation to the seller, whereby he sustained damage by trusting the purchaser, on the credit of such misrepresentations.

15. When does the contract of sale become absolute ?—491

When the terms of the sale are agreed on, and the bargain is struck, and every thing that the seller has to do with the goods is complete, without actual payment or delivery, and the property and the risk of accident to the goods, vest in the buyer. He is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery or payment. The payment or tender of the price, is, in such cases, a condition precedent implied in the contract of sale.

16. What if the purchaser becomes insolvent before the goods are delivered ?—493

The seller may retain them, even if they were sold upon credit, or if he dispatched the goods to the buyer, and insolvency occurs, he has a right in virtue of his original ownership, to stop them *in transtu.*

17. What is necessary in the first instance, to make the contract of sale valid ?—493

That there must be a delivery or tender of it, or payment, or tender of payment, or *earnest* given, or a *memorandum* in writing, signed by the party to be charged; and if nothing of this kind takes place, it is no contract, and the owner may dispose of the goods as he pleases.

18. What is the rule as to what amounts to a delivery of the goods, so as to vest the entire property in the vendee, without payment ?—494

If every thing to be done on the part of the vendor be completed, a delivery of part of a cargo or lot of goods, has, under certain circumstances, been considered a delivery of the whole, so as to vest the property. To constitute a part acceptance, so as to take the case out of the statute, there must have been such a dealing on the part of the purchaser, as to deprive him of the right to object to the quantity of the goods, or to deprive the seller of his lien.

19. Can the vendee take the goods without payment, even if an earnest has been given?—475

He cannot.

20. In what cases is a symbolical delivery sufficient to pass the property?—500

The delivery of the key of the warehouse in which goods sold are deposited, or transferring them on the warehouse-man or wharfinger's books to the name of the buyer, is a delivery, sufficient to transfer the property. So, the delivery of the receipt of the storekeeper for the goods, being the documentary evidence of the title, has been held to be constructive delivery of the goods. There may be a symbolical delivery when the thing does not admit of an actual delivery. The delivery must always be according to the subject matter of the delivery, and the property must be placed under the control and power of the vendee.

21. What has the statute of frauds provided in relation to certain contracts therein mentioned?—510

That no action should be brought to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or to charge the defendant upon any special promise, to answer for the debt, default or miscarriage of another person; or to charge any person, upon any agreement, made upon consideration of marriage, or upon any agreement that was not to be performed in one year, unless there was some memorandum, or note in writing of the agreement, signed by the party to be charged, or his agent. The statute, in respect to the memorandum, applied also to contracts for the sale of goods, wares, and merchandizes, in cases where there was no delivery and acceptance of part, or payment in part, or something earnest given. The signing of the agreement by one party, is sufficient, provided he is the party sought to be charged. It is sufficient, likewise, if the note or memorandum be made by a broker employed to effect the purchase; and the instrument is liberally construed without a scrupulous regard to forms. The signature may be made with a lead pencil, according to the practice in hurried business.

22. What are the principal rights and obligations of auctioneers?—536

An auctioneer has not only the possession of the goods which he is employed to sell, but he has an interest coupled with that possession. He has a special property in the goods, and a lien upon them for the char-

ges of the sale, and his commission, and the auction duty. He may sue the buyer for the purchase money, and if he gives credit to the vendee, and makes delivery without payment, it is at his own risk. If the auctioneer has notice that the property he is about to sell does not belong to his principal, and he sells notwithstanding the notice, he will be held responsible to the owner for the amount of the sale. So, if the auctioneer does not disclose the name of his principal at the time of the sale, the purchaser is entitled to look to him personally, for the completion of the contract, and for damages for its non-performance.

23. How are auction sales considered in regard to the statute of frauds? —539

The auctioneer is regarded as the agent of both parties, and lawfully authorized by the purchaser, either of lands or goods, to sign the contract of sale for him as the highest bidder. The writing his name as the highest bidder in the *memorandum* book of the sale by the auctioneer, immediately on receiving his bid, and knocking down the hammer, is a sufficient signing of the contract within the statute, so as to bind the purchaser.

24. What is meant by "the right of stoppage *in transitu?*"—540

It is the right which the vendor, when he sells goods to another on credit, has of resuming the possession of the goods, while they are in the hands of a carrier or middle-man, in their transit to the consignee or vendee, and before they arrive into his actual possession, or to the destination which he has appointed for them, on his becoming bankrupt or insolvent. The right exists only as between the vendor and vendee. If the price be paid, the vendor cannot stop or detain goods for money due on other accounts. The right of stoppage does not proceed upon the ground of rescinding the contract, but as a case of equitable lien. It assumes its existence and continuance; and, as a consequence of that principle, the vendee or his assignees, may recover the goods, on payment of the price; and the vendor may sue for and recover the price, notwithstanding he had actually stopt the goods *in transitu*, provided he be ready to deliver them upon payment. If he has been paid in part, he may stop the goods for the balance due him, and the part payment only diminishes the lien *pro tanto*, on the goods detained.

25. What will defeat the right?—543

Actual delivery to the vendee, or circumstances which are equivalent to actual delivery. There are cases in which constructive delivery will, and others in which it will not, destroy the right. The delivery to a carrier or packer, to and for the use of the vendee, or to a wharfinger, is a constructive delivery to the vendee; but it is not sufficient to defeat this right, even though the carrier be appointed by the vendee. The delivery to the master of a general ship, or of one chartered by the consignee is a delivery to the vendee or consignee, but still subject to this right of stoppage. And yet if the consignee had hired the ship for a term of years,

and the goods were put on board to be sent by him on a mercantile adventure, the delivery would be absolute. If the delivery to a carrier or agent of the vendee be for the purpose of conveyance to the vendee, the right of stoppage continues, notwithstanding such a constructive delivery to the vendee; but if the goods be delivered to the carrier or agent for safe custody, or for disposal on the part of the vendee, and the middle-man is by agreement converted into a special agent for the buyer, the transit or passage of the goods terminates, and with it the right of stoppage. So, a complete delivery of part of an entire parcel or cargo, terminates the *transitus*, and the vendor cannot stop the remainder.

25. What are the principal legal rules for the interpretation of contracts? —555

The mutual intention of the parties to the instrument, is the great and sometimes the difficult object of inquiry, when the terms of it are not free from ambiguity. To reach and carry that intention into effect, the law, when it becomes necessary will control even the literal terms of the contract, if they manifestly contravene the purpose. Plain and unambiguous words need no interpretation. Words are to be taken in their natural and most obvious meaning, unless some good reason be assigned to show that they should be understood in a different sense. If the intention be doubtful, it is to be sought after by reference to the context, and to the nature of the contract. It must be a reasonable construction, and according to the subject matter, and motive. The whole instrument is to be reviewed and compared in all its parts, so that every part may be made consistent and effectual. If it be a mercantile case, and the instrument be not clear and unequivocal, the usage of trade will enable us frequently to determine the precise import of the particular terms, and the certain intention declared by the use of them. Parol evidence is not admissible to supply or contradict, enlarge or vary, the words of a written contract. Parol evidence is received, when it goes, not to contradict the terms of the writing, but to defeat the whole contract, as being fraudulent or illegal. Contracts are to receive the sense in which the person making the promise believed the other party to have accepted it.

LECTURE XL.

OF BAILMENT.

1. How does the commentator define bailment?—358

To be a delivery of goods upon trust, upon a contract expressed or implied, that the trust shall be duly executed, and the goods restored by the bailee, as soon as the purpose of the bailment shall be answered.

2. How many species of bailment are there, according to Sir William Jones ?—558

Five ; viz. 1. *Depositum*, or a naked deposit without reward. 2. *Mandatum*, or commission, which is gratuitous, and by which the mandatory undertakes to do some act about the thing bailed. 3. *Commodatum*, or loan for use without pay, and when the thing is to be restored in specie. 4. *A pledge*, as when a thing is bailed to a creditor as a security for debt. 5. *Locatio*, or hiring for reward.

3. How does Justice Story subdivide the head of *Locatio ?*—591

Into, 1. *Locatio operis faciendi*, or hire of labour and services. 2. *Locatio custodiæ*, or receiving goods on deposit for hire.

4. What does he include under the head of *locatio custodiæ ?*—591

Agisters of cattle, warehouse-men and wharfingers, and also forwarding men, or merchants. They are all responsible for want of good faith, and of reasonable care and ordinary diligence, and not to any greater extent, unless the business and duty of carriers be attached to their other character.

5. How are inkeepers considered in respect to liability ?—592

They are held to be responsible to as strict and severe an extent as common carriers; and the principle was taken from the Roman law, and adopted into modern jurisprudence. In general an innkeeper is responsible for the acts of his domestics, and for thefts, and is bound to take all possible care of the goods and baggage of his guests deposited in his house or intrusted to the care of his family or servants.

6. Who is an inkeeper within the meaning of the law ?—596

One who keeps a house, and holds out that he will receive all travellers and sojourners who are willing to pay a price adequate to the sort of entertainment provided, and who come in a situation in which they are fit to be received. But the keeper of a mere coffee house, or private boarding or lodging house, is not an inkeeper in the sense of the law.

7. What are the principal rules governing the class of bailees called carriers ?—597

That the carrier for hire in a particular case, and not exercising the business of a common carrier, is only answerable for ordinary neglect, unless he by express contract assumes the risk of a common carrier. But if he be a common carrier, he is in the nature of an insurer, and is answerable for all accidents and thefts, and even for a loss by robbery. He is answerable for all losses which do not fall within the accepted cases of the act of God, or inevitable accident, without the intervention of man, and public enemies.

8. Who are common carriers?—598

Persons who undertake generally, and for all persons indifferently, to convey goods, and deliver them at a place appointed, for hire, and with or without a special agreement as to price.

9. Into what two classes are they divided?—598

Into inland carriers by land or water, and carriers by sea; and in the aggregate are included the owners of stages, waggons, and coaches, who carry goods as well as passengers for hire, waggoners, teamsters, cartmen, the masters and owners of ships, vessels, and all watercraft, including steam vessels, and steam tow-boats, belonging to internal as well as coasting and foreign navigation, lightermen and ferrymen.

10. What are the duties and obligations of coach proprietors?—601

They do not warrant the safety of passengers in the character of common carriers, and are not responsible for mere accidents to the persons of passengers, but only for the want of due care. Slight fault, unskillfulness or negligence, either as to the competence of the carriage, or the act of driving it, may render the owner responsible in damages for an injury to the passengers; they are to be transported as safely as human foresight and care will permit. The coach proprietor is not at liberty to turn away passengers, if he has sufficient room and accommodation. He is bound to provide competent vehicles, suitably equipped, and with careful and skillful drivers. He is bound to give all reasonable facilities to the reception and comfort of the passengers, and to use all precautions, as far as human care and foresight will go for their safety on the road. He is answerable for the smallest negligence in himself and his servants.

LECTURE XLI.

OF PRINCIPAL AND AGENT.

1. On what is agency founded?—612

Upon a contract, either express or implied, by which one of the parties confides to the other the management of some business, to be transacted in his name, or on his account, and by which the other assumes to do the business, and render an account of it.

2. How may the authority of an agent be created?—612

By deed or writing, or verbally without writing; and for the ordinary purposes of business and commerce, the latter is sufficient.

3. May agency be inferred without proof of any express appointment?—613

It may, from the relation of the parties, and the nature of the employment. It is sufficient that there be satisfactory evidence of the fact that the principal employed the agent and that the agent undertook the trust.

4. Can an agent convey real estate under an implied contract?—613

He cannot; to convey lands he must have an appointment in writing; and where the conveyance is required to be by deed, the authority to the attorney to execute it must be commensurate in point of solemnity, and be by deed also. The agency must be antecedently given, or be subsequently adopted; and in the latter case, there must be some act of recognition.

5. Is an acquiescence in the assumed agency of another, equivalent to an express authority?—614

It is when the acts of the agent are brought home to the knowledge of the principal. By permitting another to hold himself out to the world as his agent, the principal adopts his acts, and will be held bound to the person who gives credit thereafter to the other, in the capacity of his agent. When the principal is informed of what has been done, he must dissent, and give notice of it in a reasonable time; and if he does not, his assent and ratification will be presumed.

6. What are the rights of an assumed agent against his principal?—616

The Roman law would oblige a person to indemnify an assumed agent, acting without authority, and without any assent or acquiescence given to the act, provided it was an act necessary and useful at its commencement. But the English law has never gone to that extent; and therefore if A. owes a debt to B., and C. chooses to pay it without authority, the law will not raise a promise in A. to indemnify C.; for if it were so, it would be in the power of C. to make A. his debtor *nolens volens*.

7. What is the English rule where there is an existing business relation between the parties?—617

That if payment be made under the pressure of a situation, in which one party was involved by the other's breach of faith, it will be binding on the person for whose use it was made. A surety, from his relation to the principal debtor, has an interest and a right to see that the debt be paid; and if he pays to relieve himself, it is his money paid to and for the use of the other.

8. What is the rule as to the duty of an agent in the pursuance of his authority?—617

That, if an agent be intrusted with general powers, he must act with sound discretion, and he has all the implied powers within the scope of the employment. A power to settle an account, implies the right to allow payments already made. If he be an empowered agent for a particular transaction, he is not bound to go on and do all other things connected with, or arising out of the case. If his powers are special, and limited, he must strictly follow them.

9. What if an agent do all he is authorized to do, and something more? —618

It will be good so far as he had a right to go, and the excess only will be void. As if A. authorize B. to buy an estate for him at 50 dollars per acre, and he gives 51 dollars per acre, A. is not bound to pay that price; but the better opinion is, that if B. offers to pay the excess out of his own pocket, A. is then bound to take the estate. This case is stated in the civil law, and the most equitable conclusion among the civilians is, that A. is bound to take the estate at the price he prescribed. *Majori summæ minor inest.* But a distinction is to be made according to the nature of the subject. If a power be given to buy a house, with an adjoining wharf and store, and the agent buys the house only, the principal would not be bound to take the house, for the inducement to the purchase has failed. So, if he be instructed to purchase the fee of a certain farm, and he purchase an interest for life or years only, or he purchases only the undivided right of a tenant in common in the farm; in these cases the principal ought not to be bound to take such a limited interest, because his object was defeated. Whether the principal would, or would not be bound by an act, executed in part only, depends in a measure upon the nature and object of the purchase.

10. What if an agent has power to lease for 21 years, and he leases for 26 years?—619

The lease, in equity, would be void only for the excess, because the line of distinction between the good execution of the power, and the excess, can be easily made. But, at law, even such a lease would not be good *pro tanto*, or for 21 years. If, however, the agent does a different business from that he was authorized to do, the principal is not bound, because the agent departed from the subject matter of the instruction. There is a very important distinction on this subject, of the powers of an agent, between a general agent and one appointed for a special purpose. The acts of a general agent, or one whom a man puts in his place to transact all his business of a particular kind, will bind his principal, so long as he keeps within the general scope of his authority, though he may act contrary to his private instructions; and the rule is necessary in order to prevent fraud, and encourage confidence in dealing. But an agent, constituted for a particular purpose, and under a limited power, cannot bind his principal if he exceeds that power. The special authority must be strictly pursued. Whoever deals with an agent, constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power.

11. What if the servant of a horse dealer, who sells for his master, but with express instructions not to warrant as to soundness, does warrant, is the master bound by the warranty ?—621

He is; because the servant, having a general power to sell, acted within the general scope of his authority; and the public cannot be supposed to be acquainted with the private conversations between the master and servant. So, if a broker, whose business it is to buy and sell goods in his own name, be intrusted by a merchant with the possession and apparent control of his goods, it is an implied authority to sell, and the principal will be concluded by the sale.

12. If a person intrusts his watch to a watchmaker to be repaired, and he sells it, would the owner be bound by the sale ?—622

He would not. The watchmaker is not exhibited to the world as owner, and credit is not given to him as such, merely because he has possession of the watch.

13. What is the rule as to the right of brokers and factors, to sell on credit, without a special authority for that purpose ?—622

That a factor or merchant who buys or sells upon commission, or as an agent for others, for a certain allowance, may sell on credit, without any special authority for that purpose. It is the well settled usage, that an agent may sell in the usual way, and, consequently, he may sell upon credit without incurring risk, provided he be not restrained by his instructions, and does not unreasonably extend the term of credit, and provided he uses due diligence to ascertain the solvency of the purchaser. But the factor cannot sell on credit, in a case in which it is not the usage, as the sale of stock, for instance, unless he be expressly authorized, because this would be to sell in an unusual manner. Nor can he bind his principal to other modes of payment than a payment in money at the time of sale, or on the usual credit.

14. What if the factor at the expiration of the credit given on a sale, takes a note payable to himself at a future day ?—623

He makes the debt his own. He cannot bind his principal to allow a set-off on the part of a purchaser. If the factor, in a case duly authorized, sells on credit, and takes a negotiable note, payable to himself, the note is taken in trust for his principal, and subject to his order; and if the purchaser should become insolvent before the day of payment, the circumstance of the factor having taken the note in his own name, would not render him personally responsible to his principal. Even if the factor should guaranty the sale, and undertake to pay if the purchaser failed, or should sell without disclosing his principal, the note taken by him as factor would still belong to the principal, and he might wave the guaranty, and claim possession of the note, or give notice to the purchaser not to pay it to the factor. In such a case, if the factor should fail, the note would not pass to his assignees, to the prejudice of his principal; and if the assig-

nees should receive payment from the vendee, they would be responsible to the principal; for the debt was not in law due them, but to the principal, and did not pass under the assignment.

15. What is the general doctrine on this subject?—623

That where the principal can trace his property into the hands of an agent or factor, he may follow either the identical article, or its proceeds, into the possession of the factor, or his legal representatives or assignees, unless they should have paid away the same in their representative character, before notice of the claim of the principal The same rule applies to the case of a banker, who fails, possessed of his customer's property. If it be distinguishable from his own, it does not pass to his creditors, but may be reclaimed by the true owner, subject to the liens of the banker upon it. Though payment to a factor, for goods sold by him be valid, the principal may control the collection, and sue for the price in his own name, or for damages for non-performance of the contract; and it is immaterial whether the agent was an auctioneer or common factor.

16. In what cases does a factor sell on credit at his own risk?—624

When he acts under a *del credere* commission, for an additional premium, he becomes liable to his principal when the purchase money falls due; for he is substituted for the purchaser, and is bound to pay, not conditionally, but absolutely, and in the first instance. The principal may call on him without looking to the actual vendee. This is the language of *Grove* v. *Dubois*, (1 *Term Rep.* 112,) and it seems to have been adopted and followed in *Leverick* v. *Meigs;* (1 *Cowen's Rep.* 645,) and yet there is some difficulty and want of precision in the cases on the subject. It is said, that a factor under a *del credere* commission, is a guarantor of the sale, and that the notes which he takes from the purchaser belong to his principal, equally as if he had only guarantied them. If he sells under a *del credere* commission, he is to be considered, as between himself and the vendee, as the sole owner of the goods; and yet he is considered only as surety. In some late cases in the C. B., in England, it was considered to be a vexed question, whether a *del credere* commission was a contract of guaranty merely on default of the vendee, or one altogether distinct from it, and not requiring a previous resort to the purchaser.

17. What is the rule as to the factor's right to pledge the goods of his principal?—625

That he cannot pledge them as security for his own debt, not even though there be the formality of a bill of parcels and a receipt. The principal may recover the goods of the pawnee; and his ignorance that the factor held the goods in the charactor of factor is no excuse. The principal is not obliged to tender to the pawnee the balance due from the principal to the factor: for the lien which the factor might have had, for such balance is personal, and cannot be transferred by his tortious act.

Though the factor should barter the goods of his principal, yet no property passess by the act, any more than in the case of pledging them, and the owner may sue the innocent purchaser in trover. The doctrine that the factor cannot pledge, is sustained so strictly, that it is admitted that he cannot do it by endorsement and delivery of the bill of lading, any more than by delivery of the goods themselves. To pledge the goods of the principal, is beyond the scope of the factor's power; and every attempt to do it, under colour of a sale, is tortious and void.

18. What exception is there to this rule?—626

The case of negotiable paper, for there possession and property go together, and carry with them a disposing power. A factor may pledge the negotiable paper of his principal as security for his own debt, and it will bind the principal, unless he can charge the party with notice of the fraud or want of title in the agent.

19. What is the rule as to the factor's right to deliver the goods of his principal to a third person?—626

That he may deliver them to a third person for his own security, with notice of his lien, and as his agent, to keep possession for him. Such a change of the lien does not effect the factor's right, for it is, in effect, a continuance of the factor's possession. So, if a factor, having goods consigned to him for sale, should put them into the hands of an auctioneer, or commission merchant connected with the auctioneer in business, to be sold, the auctioneer may safely make an advance on the goods for purposes connected with the sale, as part payment in advance, or in anticipation of the sale, according to the ordinary usage in such cases. But if the goods be put into the hands of an auctioneer to sell, and, instead of advancing money upon them in immediate reference to the sale according to usage; the auctioneer should become a pawnbroker, and advance money on the goods by way of loan, and in the character of pawnor instead of seller, he has no lien on the goods. In *Graham* v. *Dyster*, it was decided by K. B., that though the principal drew upon his factor for the amount of the consignment, and the goods were sent to the factor to be dealt with according to his discretion, the factor could not pledge the goods, even in that case, to raise money to meet the bills.

20. What is the rule as to the liability of an agent upon his contract as agent?—630

The general rule is, that where an agent is duly constituted, and names his principal, and contracts in his name, the principal is responsible, and not the agent. The agent becomes personally liable only when the principal is not known, or when there is no responsible principal, or where the agent becomes liable by an undertaking in his own name, or when he exceeds his power. If he makes the contract in behalf of his principal, and discloses his name at the time, he is not personally liable, not even though he should take a note for the goods sold, payable to him-

self. And if an agent buys in his own name, but for the benefit of his principal, and without disclosing his name, the principal is also bound as well as the agent, provided the goods came to his use, or the agent acted in the business intrusted to him, and according to his power.

21. What are the rules by which attorneys must execute powers? —631

That an attorney who executes a power, as by giving a deed, must do it in the name of his principal; for if he executes it in his own name, though he describes himself to be the agent or attorney of his principal, the deed is held to be void; and the attorney is not bound, even though he had no authority to execute the deed, when it appears on the face of it to be the deed of the principal. But if the agent binds himself personally, and engages expressly in his own name, he will be held responsible, though he should, in the covenant, give himself the description or character of agent. And though the attorney, who acts without authority, but in the name of the principal, be not personally bound by the instrument he executes, if it contain no covenant or promise on his part, yet there is a remedy against him by special action on the case, for assuming to act when he had no power.

22. What is the rule as to the owner's right to collect the proceeds of goods sold by his factor?—632

That he may command such proceeds, and is entitled to call upon the buyer for payment, before the money is paid over to the factor; and a payment to the factor after notice from the owner not to pay, would be a payment by the buyer in his own wrong, and it would not prejudice the rights of the principal. If, however, the factor should sell in his own name as owner, and not disclose his principal, a purchaser who dealt *bona fide* with the factor as owner, will be entitled to set off any claim he may have against the factor, in answer to a demand of the principal.

23. What is the distinction made in the books, in regard to personal responsibility, between public and private agents?—632

That if an agent, on behalf of government, makes a contract, and describes himself as such, he is not personally bound, even though the terms of the contract be such as might, in a case of a private nature, involve him in a personal obligation.

24. What is the rule as to the right of an agent to employ a sub-agent? —633

That an agent, without an express authority, has not power to employ a sub-agent to do the business, without the knowledge or consent of his principal. The maxim is, that *delegatus non potest delegare*, and the agency is generally a personal trust and confidence which cannot be delegated.

25. What is meant by lien?—634

The right of an agent to retain possession of property until some demand of his be satisfied. It is created either by common law, or by the usage of trade, or by the express agreement or particular usage of the parties.

26. Into what classes are liens distinguished?—634

Into general and special. A general lien, is the right to retain property of another, for a general balance of accounts; but a particular lien is a right to retain it only for a charge on account of labour employed or expenses bestowed upon the identical property detained. General liens are looked upon with jealousy, because they encroach upon the common law, and destroy the equal distribution of the debtor's estate among his creditors: and the usage of any trade sufficient to establish a general lien, must have been so uniform, and notorious, as to warrant the inference that the party against whom the right is claimed had knowledge of it. A general lien may be created by express agreement.

27. What is necessary to create a lien?—638

Possession of the goods; and the right does not extend to debts which accrued before the character of factor commenced; nor where the goods of the principal do not, in fact, come to the factor's hands, even though he may have accepted bills upon the faith of the consignment, and paid part of the freight.

28. What persons have a general lien on goods in their possession?—640

A factor has a general lien for the balance of his general account, arising in the course of dealings between him and his principal; and this lien extends to all the goods of the principal in his hands in the character of factor. The factor has a lien, also, on the price of the goods which he has sold as factor, though he has parted with the possession of the goods; and he may enforce payment from the buyer to himself, in opposition to his principal. This rule applies, when he becomes surety for his principal, or sells under a *del credere* commission, or is in advance for the goods by actual payment. Attorneys and solicitors, as well as factors, have a general lien, upon the papers of their clients in their possession, for the balance of their professional accounts. Dyers have likewise a general lien on the goods sent to them to dye, for the balance of a general account. A banker has also a general lien on all the paper securities which come to his hand. So has an insurance broker. A wharfinger has also a general lien.

29. By what acts may an agency cease?—643

It may terminate by the death of the agent; by the limitation of the power to a particular period of time; by the execution of the business

which the agent was constituted to perform; by a change in the condition of the principal; by his express revocation of the power; and by his death. The agent's trust is not transferable, either by the act of the party, or by operation of law. According to the civil law, if the agent had entered upon the execution of the trust in his lifetime, and left it partially executed, but incomplete, at his death, his legal representatives would be bound to complete it. An authority given for private purposes to two persons, cannot be executed by the survivor, unless it be so expressly provided, or it be an authority coupled with an interest.

END OF VOLUME SECOND.

VOLUME III.

OF THE LAW CONCERNING PERSONAL PROPERTY.

LECTURE XLII.

OF THE HISTORY OF MARITIME LAW.

1. Is the marine law a municipal, or international law?—1

It is a part of the general law of nations, and not the law of a particular country. The marine law of the United States is the same as the marine law of Europe; and Lord Mansfield applied to its universal adoption the expressive language of Cicero, when speaking of the eternal laws of justice: *Nec erit alia lex Romæ, alia Athænis; alia nunc, alia posthac; sed et omnes gentes, et omni tempore una lex et sempiterna, et immortalis continebit.*

2. What is known of the marine legislation of the ancients?—2

There is no certain evidence that either the Phœnicians, Carthagenians, or any of the states of Greece, formed any authoritative digest of naval law. Those powers were distinguished for navigation and commerce, and the Athenians in particular were very commercial, and they kept up a busy intercourse with the Greek colonies in Asia Minor, and on the borders of the Euxine and the Hellespont, in the islands of the Ægean sea, and in Sicily and Italy. They were probably the greatest naval power in all antiquity. Themistocles had the sagacity to discern the wonderful influence and controlling ascendency of naval power. It is stated by Diodorus Siculus, that he persuaded the Athenians to build twenty ships annually. He established the Piræus as a great commercial emporium and arsenal for Athens, and the cultivation of her naval superiority and glory was his favourite policy; for he held the proposition, which Pompey afterwards adopted, that the people, who were masters of the sea, would be masters of the world. The Athenians encouraged, by their laws, navigation and trade; and there was a particular jurisdiction at Athens for the cognizance of contracts, and controversies between merchants and mariners.

3. Who were the earliest people that actually created, digested, and promulgated a system of marine law?—3

The Rhodians. They obtained the sovereignty of the seas about nine hundred years before the Christian era, and were celebrated for their naval power and discipline. Their laws concerning navigation were received at Athens, and in all the islands of the Ægean sea, and throughout the coasts of the Mediterranean, as a part of the law of nations.

4. By whom was the earliest code of modern sea laws established?—9

By the republic of Amalphi, in Italy, towards the end of the eleventh century.

5. What code of marine law is the oldest now extant?—10

The *Consolato del mare.* This is a compilation of the usages and laws of the Mediterranean powers, and is said to have been digested at Barcelona, in the Catalan tongue, during the middle ages, by order of the kings of Arragon. Its origin, however, is doubtful, and the precise time of its publication not known; but it is certain that it became the common law of all the commercial powers of Europe. The marine laws of Italy, Spain, France, and England were greatly affected by its influence; and it formed the basis of subsequent maritime ordinances.

5. What collection is next in point of antiquity and celebrity?—12

The laws of Oleron. They were collected and compiled in the island of Oleron, on the coast of France, in or about the time of Richard I. They were borrowed from the Rhodian laws, and the *Consolato*, with alterations and additions, adapted to the trade of western Europe.

6. By whom were the laws of Wisbuy compiled?—13

By the merchants of the city of Wisbuy, in the island of Gothland, in the Baltic sea, about the year 1288. They were in many points, a repetition of the judgments of Oleron, and became the basis of the Hanseatic league.

7. About what time was the Hanseatic league formed?—14

This renowned association was begun at least as early as the middle of the thirteenth century, and it originated with the cities of Lubec, Bremen, and Hamburgh. The free and privileged Hanse Towns became the asylum of commerce, and the retreats of civilization, when the rest of Europe was subjected to the iron sway of the feudal system, and the northern seas were infested by "savage clans, and roving barbarians." Their object was mutual defence against piracy by sea and pillage by land. They were united by a league offensive and defensive, and with an intercommunity of citizenship and privileges. The association of the cities of Lubeck, Brunswick, Dantzick, and Cologne, commenced in the year 1254, according to Cleirac, and in 1164, according to Azuni; and it became so safe and beneficial a confederacy, that all the cities and large towns on the Baltic, and on the navigable rivers of Germany, to the number of

eighty-one, acceded to the union. One of the means adopted by the confederates to insure prosperity to their trade, and to protect them from controversies with each other, was the formation of a code of maritime law.

9. At what time was the French ordinance upon commerce promulgated?—15

In 1673, and the ordinance of the marine in 1681. This ordinance, says Valin, was executed in a masterly manner. It was so comprehensive in its plan, so excellent in the arrangement of its parts, so just in its decisions, so wise in its general and particular policy, so accurate and clear in its details, that it deserves to be considered as a model of a perfect code of maritime jurisprudence.

10. Where is the English maritime law to be found?—18

The English nation never had any general and solemnly enacted code of maritime law, resembling those which have been mentioned as belonging to the other European nations, and promulgated by legislative authority; This deficiency has been supplied, not only by several extensive private compilations, but has been more eminently and more authoritatively supplied by a series of judicial decisions, commencing about the middle of the last century. Those decisions have shown, to the admiration of the world, the masterly acquaintance of the English judiciary with the principles and spirit of commercial policy and general jurisprudence, and they have afforded undoubted proofs of the entire independence, impartiality, and purity of the administration of justice. The numerous cases in the books of reports which have arisen upon maritime questions, resemble elementary treatises in the depth, extent, and variety of their researches. The English maritime law can now be studied in the adjudged cases with at least as much profit, and with vastly more pleasure, than in the dry and formal didactic treatises and ordinances professedly devoted to the science.

11. Where do we find the marine law of the United States?—19

As in England, in private treatises and judicial decisions. Our improvement has been rapid and our career illustrious, since the adoption of the present constitution of the United States. There have been several respectable treatises on subjects of commercial law. The decisions in the federal courts, in commercial cases, have done credit to the moral and intellectual character of the nation; and the admiralty courts in particular have displayed great research, and a familiar knowledge, of the principles of the marine law of Europe.

LECTURE XLIII.

OF THE LAW OF PARTNERSHIP.

1. What is a partnership ?—23

It is a contract of two or more persons, to place their money, effects, labour, and skill, or some, or all of them, in lawful commerce or business, and to divide the profit, and bear the loss in certain proportions.

2. What are the two leading principles of the contract ?—24

A common interest in the stock of the company, and a personal responsibility for the partnership engagements.

3. To what does the common interest apply ?—24

To all the partnership property, whether vested in the first instance by their several contributions to the common stock, or afterwards acquired in the course of the partnership business; and that property is first liable for the debts of the company; and after they are paid, and the partnership dissolved, then it is subject to a division among the members, or their representatives, according to agreement.

4. What if one party advance funds, and another furnish his personal services or skill, in carrying on a trade, and is to share the profits ?—24

It amounts to a partnership. But each party must engage to bring into the common stock something that is valuable; and a mutual contribution of that which has value is of the essence of the contract.

5. Are joint possessors partners ?—25

A joint possession renders persons tenants in common, but it does not, of itself, constitute them partners, and, therefore, surviving partners, and the representatives of a deceased partner, are not partners, notwithstanding they have a community of interest in the joint stock. There must be a communion of profit to constitute a partnership, as between the parties.

6. Is a joint purchase, with a view to separate and distinct sales, by each person on his own account sufficient to constitute a partnership ?—25

It is not.

7. If several persons who had never met and contracted together as partners, agree to purchase goods in the name of one of them only, and

to take aliquot share of the purchase, and employ an agent for that purpose ; do they by that act become partners, and answerable to the seller in that character ?—25

They do not, provided they are not jointly concerned in the re-sale of their shares, and have not permitted the agent to hold them out as jointly liable with himself. The same distinction was taken in the civil law : *qui nolunt inter se contendere, solent per nuntium rem emere in commune ; quod a societate longe remotum.* It has been frequently recognized in this country, and may be considered as a settled rule.

8. What if the purchase be on a separate, and not on a joint account ?—26

If the interests of the purchasers be afterwards mingled, with a view to a joint sale, a partnership exists from the time that the shares are brought into a common mass. A participation in the loss or profit, or holding himself out to the world as a partner, so as to induce others to give credit on that assurance, renders a person responsible as a partner.

9. What does a partnership necessarily imply ?—26

A union of two or more persons.

10. What if a single individual, for the purpose of a fictitious credit, were to assume a co-partnership name ?—26

The only real partnership principle that could apply to his case, would be the preference to be given to creditors dealing with him under that description, in the distribution of his effects. But that would be inadmissible, and contrary to the grounds upon which partnerships are created and sustained ; and so the law has, in another country, been understood and declared.—*Bell's Commentaries on the Law of Scotland*, vol. ii. 625.

11. What is the rule in relation to large unincorporated joint stock companies ?—26

Trading upon joint stock is usually regulated by special agreement ; but the established law of the land, in reference to such partnerships, is the same as in ordinary cases, and every member of the company, (whatever private arrangement there may be to the contrary between the members, and which is only a mischievious delusion) is liable for the debts of the concern.

12. What is the rule in relation to incorporated companies ?—27

That incorporated companies, though constituted expressly for the purposes of trade, are not partnerships, or joint traders, within the purview of the law of partnership, and the stockholders are not personally responsible for the company's debts or engagements, and their property is affected only to the extent of their interest in the company.

13. In what manner may the contract of partnership be formed ?—27

It need not be in writing ; for though there be no express articles of co-partnership, the obligation of a partnership engagement may equally be implied in the acts of the parties ; and if persons have a mutual interest in the profits and loss of any business carried on by them, or if they hold themselves out to the world as joint traders, they will be held responsible as partners to third persons. If a person partakes of the profits, he is liable for the losses. It is not necessary that every member of the company should, in every event, participate in the profits. It would be a valid partnership, according to the civil law, if one of the members had a reasonable expectation of profit. So, one partner may retire under an agreement to abide his proportion of risk of loss, and take a sum in gross for his share of future uncertain profits ; or he may take a gross sum as his share of the presumed profits, with an agreement that the remaining partners are to assume all the risks.

14. What is the rule as to the extent of partnership connexions ?—30

That there may be a general partnership at large, or it may be limited to a particular branch of business, or to one subject. There may be a partnership in the goods in a particular adventure, or it may be confined to the profits thereof. If two persons should draw a bill of exchange, they are considered as partners in respect to that bill, though in every other respect they remain distinct.

15. What is the rule governing dormant partners ?—31

That they are equally liable when discovered, as if their names had appeared in the firm, and although they were unknown to be partners at the time of the creation of the debt.

16. Who are nominal partners ?—32

Persons who have no actual interest in the trade, or its profits ; but who become responsible as partners by voluntarily suffering their names to appear to the world as partners, by which means they lend to the partnership the sanction of their credit. There is a just and marked distinction between partnership as respects the public, and as respects the parties ; and a person may be held liable as a partner to third persons, although the agreement does not create a partnership as between the parties themselves. Each individual is answerable *in solido* to the whole amount of the debts, without reference to the proportion of his interest, or to the nature of the stipulation between him and his associates. Even if it were the intention of the parties that they should not be partners. This principle of law inculcates good faith and ingenuous dealing, and it is now regarded by the English courts as a fundamental doctrine. It has been explicitly asserted with us, and is now incorporated in the jurisprudence of this country.

17. What if executors in the disinterested performance of a trust, con-

tinue the testator's share in a partnership, for the benefit of his infant children ?—33

They may render themselves personally liable as dormant partners.

18. How are limited partnerships formed ?—35

They consist of one or more persons jointly and severally responsible according to the existing laws, who are called general partners, and one or more who furnish certain funds to the common stock, and whose liability shall extend no further than the fund furnished, and who are called special partners. The names of the special partners are not to be used in the firm, nor are they to transact any business on account of the partnership, or be employed for that purpose, as agents. By the civil code of Louisiana, art. 2810, if the advance in *commendam*, i. e. (the funds furnished by the special partner,) has been made to one person only, such person must carry on the business in his sole name, and must not take the addition, "*and company*." And if the partner in *commendam* shall take any part in the business of the partnership or permit his name to be used in the firm, or knowingly permit any single person to whom he has made the advance, to add any words to his name or firm, that may imply that he has other partners, besides the partner in *commendam*, when in fact he has none, such partner *in commendam* shall be liable to all the responsibilities of a general partner in the business for which he has made the advance.

19. What is the legal interest of partners in their stock in trade ?—36

They are joint tenants, but without the *jus accrescendi*, or right of survivorship ; and this, according to Lord Coke, was part of the law merchant. On the death of one partner, his representatives become tenants in common with the survivor, and with respect to *choses in action*, survivorship so far exists at law, that the remedy to reduce them into possession vests exclusively in the survivor, for the benefit of all the parties in interest. The interest of each partner in the partnership property, is his share in the surplus, after the partnership accounts are settled, and all just claims satisfied.

20. What is the legal interest of partners in real estate acquired with partnership funds ?—37

A joint-tenancy in law, yet equity will hold it to be a tenancy in common, and as forming part of the partnership fund ; and the better opinion would seem to be, that equity will consider the person in whom the legal estate is vested, as trustee for the whole concern, and the property will be entitled to be distributed as personal estate. In Tennessee, New York, and Massachusetts, it has been held, that partners purchasing an estate out of the joint funds, and taking one conveyance to themselves as tenants in common, would hold their undivided moieties in separate and independent titles, and that the same would go, on the insolvency of the firm, or death of either, to pay their respective creditors at large. 3 *Hayw.*, 96. 15 *Johns. Rep.* 159. 11 *Mass. Rep.* 496

In Virginia, such an investment has been regarded as partnership stock, and subject to all the incidents of partnership property. (4 *Mumford*, 316.) In *Winslow* v. *Chifelle*, (*State Reports in Equity, S. Car.*,) it was held that lands held and used by partners, in the business of a mill, was co-partnership property, and subject to be applied, like other partnership property, to the payment of partnership debts, in preference to the claims of separate creditors. The general principle now declared of the English law is, that real estate acquired for the purpose of a trading concern, is to be considered as partnership property, and to be first applied in satisfaction of the demands of the partnership. (1 *Russel & Mylne*, 45.) It is taken to be personal estate, and retains that character as between the real and personal representatives of a deceased partner. (1 *Mylne & Keene*, 649.) In Ohio a similar rule has been declared, and that such property was not subject to the dower of the widow of a deceased partner, as against partnership debts. (1 *Hammond's Ohio Rep.*, 535.) The better opinion appears to be, that although the legal estate in freehold property purchased by the partners, for the purpose of their trade, will go in the course of ordinary descent without survivorship, yet the equitable interest in such property, will be held to be part of the partnership stock, and distributable as personal estate. (*Colyer on Part.*, 76.)

21. How are ship-owners considered ?—39

In *Nicol* v. *Mumford*, (4 *Johns. Chan. Rep.*, 522,) it was held, that ship-owners were tenants in common, and were not to be considered as partners, nor liable each *in solido*, nor entitled to the settlement of accounts, on the principle of partnership.

22. In what acts may a partner bind his firm ?—40

He can buy and sell partnership effects, and make contracts in reference to the business of the firm, and pay and receive, and draw and endorse, and accept bills and notes. The act of one partner, though on his private account, and contrary to private arrangement among themselves, will bind all the parties, if made without knowledge in the other party of the arrangement, and in a matter which, according to the usual course of dealing, has reference to business transacted by the firm.

In all contracts concerning negotiable paper, the act of one partner binds all ; and even though he signs his individual name, provided it appears, on the face of the paper, to be on partnership account. But if a bill or note be drawn by one partner, in his own name only, and without appearing to be on partnership account, the partnership is not bound by the signature, even though it was made for a partnership purpose. If, however, the bill be drawn by one partner in his own name, upon the firm, on partnership account, the act of drawing has been held to amount, in judgment of law, to an acceptance of the bill by the drawer in behalf of the firm, and to bind the firm as an accepted bill. And though the partnership be not bound at law in such a case, it is held, that equity will force the payment of it, if the bill was actually drawn on partnership account.

23. What is the rule with respect to the power of each partner over the partnership property ?—44

It is settled, that each one, in ordinary cases, and in the absence of fraud on the part of the purchaser, has the complete *jus disponendi* of the whole partnership interests, and is considered to be the authorized agent of the firm. He can sell the effects, or compound or discharge the partnership debts. A like power in each partner exists in respect to purchases on joint account; and it is no matter with what fraudulent views the goods were purchased, or to what purposes they were applied by the purchasing partner, if the seller be clear of the imputation of collusion.

24. In what cases may a partner pledge the partnership effects ?—46

A partner may pledge, as well as sell, the partnership effects, in a case free from collusion, if done in the usual mode of dealing, and it has relation to the trade in which the partners are engaged, and when the pawnee had no knowledge that the property was partnership property. But this principle does not extend to part owners engaged in a particular purchase; for they are regarded as tenants in common, and no member can convey to the pawnee a greater interest than he himself has in the concern. If one member acts fraudulently with strangers in a matter within the scope of the partnership authority, the firm is, nevertheless, bound by the contract.

25. How far may a partner bind his co-partners by guaranty ?—46

It was formerly understood, that one partner might bind his co-partners by a guaranty, or letter of credit, in the name of the firm; and Lord Eldon, in the case *Ex parte Gordon*, (15 *Vesey*, 286,) considered the point too clear for argument. But a different principle seems to have been adopted; and it is now held, that one partner is not authorized to bind the partnership by a guaranty of the debt of a third person, without a special authority for that purpose, or one to be implied from the previous course of dealing between the parties, unless the guaranty be afterwards adopted by the firm. The guaranty must have reference to the regular course of business transacted by the partnership, and then it will be obligatory upon the company, and this is the principle upon which the distinction rests.

26. In what cases may a partner bind his firm by deed ?—47

A partner can not charge the firm by deed, with a debt, even in commercial dealings. But one partner, may, by the special authority of his co-partners under seal, and if in their presence, by parol authority, execute a deed for them in a transaction in which they were all concerned. The more recent cases have very considerably relaxed the former strictness on this subject; and while they profess to retain the rule itself, they qualify it exceedingly, in order to make it suit the exigencies of commercial associations. An absent partner may be bound by a deed executed on

behalf of the firm, by his co-partner, provided there be either a previous parol authority, or a subsequent parol adoption of the act.

One partner may by deed execute the ordinary release of a debt belonging to the co-partnership, and thereby bar the firm of a right it possessed jointly. A release by one partner, to a partnership debtor, after the dissolution of the partnership, has been held to be a bar of any action at law against the debtor. So, also, in bankruptcy, one partner may execute a deed, and do any other act requisite in proceedings in bankruptcy. The acknowledgment of a debt by a single partner, during the continuance of the partnership will bind the firm.[1]

27. How may a partnership be dissolved?—52

If a partnership be formed for a single purpose or transaction, it ceases as soon as the business is completed. If it be for a definite period, it terminates of course when the period arrives. It may be dissolved by the voluntary act of the parties, or of one of them, and by the death, insanity, or bankruptcy of either, and by judicial decree, or by such change in the condition of one of the parties as disables him to perform his part of the duty. It may also be dissolved by operation of law, by reason of war between the governments to which the partners respectively belong, so as to render the business carried on by the association impracticable and unlawful.

28. What is the rule as to dissolution by the voluntary act of the parties?—53

The established principle is, that, if the partnership be for an indefinite period, any partner may withdraw at a moment's notice, when he pleases, and dissolve the partnership. The civil law contains the same rule on the subject. The existence of engagements with third persons does not prevent the dissolution by the act of the parties, or either of them, though those engagements will not be affected. But if the partners have formed a partnership by articles, for a definite period, in that case it is said, that it cannot be dissolved without mutual consent before the period arrives. This is the assumed principal of law by Lord Eldon, in *Peacock* v. *Peacock*, (16 *Vesey*, 56,) and in *Crawshay* v. *Maule*, (1 *Swanst. Rep.* 495.) In New York it has been held, that the voluntary assignment by one partner, of all his interest in the concern, dissolved the partnership, though it was stipulated in the articles, that the partnership was to continue until two of the partners should demand a dissolution, and the other partners wished to continue the partnership.—17 *John's Rep.* 525, 19 *id.* 538.

29. What effect has the death of a partner?—56

It is *ipso facto* a dissolution of the partnership, however numerous the association may be.

30. What is the effect of insanity?—58

It does not *ipso facto* work a dissolution of the partnership. It depends upon circumstances under the sound discretion of the court of chancery.

31. What is the effect of the bankruptcy of a partner?—58

Bankruptcy or insolvency, either of the whole of the partnership, or of an individual member, dissolves the partnership. A *bona fide* voluntary assignment by a partner of all his interest in the partnership stock, has the same effect. The dissolution takes place, and the joint tenancy is severed, from the time that the partner, against whom the commission issues, is adjudged a bankrupt, and the dissolution relates back to the act of bankruptcy.

32. What are the consequences of a dissolution of a partnership?—62

When a partnership is actually ended by death, notice, or other effectual mode, no person can make use of the joint property in the way of trade, or inconsistently with the purpose of settling the affairs of the partnership, and winding up the concern. The power of one partner to bind the firm, ceases immediately upon its dissolution; and the partners from that time, become distinct persons, and tenants in common of the joint stock. One partner cannot endorse bills and notes previously given to the firm, nor accept a bill previously drawn on it, so as to bind it. A dissolution, is in some respects, prospective only, and either of the former partners can receive payment of debts due to the firm, and give a release. On a dissolution by death, the surviving partner settles the affairs of the concern. The good will of a trade is not partnership stock. It has been decided to be the right of the survivor.

33. What is the rule as to the payment of debts?—65

That partnership debts must be paid out of partnership estate, and private and separate debts out of the private and separate estate of the individual partner. If the partnership creditors cannot obtain payment out of the partnership estate, they cannot resort to the private and separate estate, until private and separate creditors are satisfied; nor have the creditors of the individual partners any claim upon the partnership property, until all the partnership creditors are satisfied. The basis of the general rule is, that the funds are to be liable on which the credit was given.

34. What is the rule as to notice of the dissolution?—66

To render the dissolution safe and effectual, there must be due notice given of it to the world; and a firm may be bound, after the dissolution of the partnership, by a contract made by one partner in the usual course of business, and in the name of the firm, with a person who contracted on the faith of the partnership, and had no notice of the dissolution. What shall be a sufficient implied notice has been a vexed question in the books. A notice in one of the public and regular newspapers of the city or county where the partnership business was carried on, is the usual mode of giving information, and may, in ordinary cases, be quite sufficient. As to persons who have been previously dealing with the firm, it is requisite that actual notice be brought home to the creditor, or, at least, that it be

given under circumstances from which actual notice may be inferred. If the facts are all found or ascertained, the reasonableness of notice may be a question of law for the court, but generally it will be a mixed question of law and fact. When a single partner retires from the firm, the same notice is requisite, and if due notice be given, yet, if the retiring partner willingly suffers his name to continue in the firm, he will still be holden. A dormant partner may withdraw without giving public notice.

LECTURE XLIV.

OF NEGOTIABLE PAPER.

1. What is a bill of exchange ?—74

It is a written request by one person to another, for the payment of money, absolutely and all events. If A., living in New York, wishes to receive $1000, which await his order in the hands of B., in London ; he applies to C., going from New York to London, to pay him $1000, and take his draft on B., for that sum payable at sight.

2. By what terms are the parties known in law ?—75

A., who draws the bill, is called the *drawer*. B., to whom it is addressed, is called the *drawee*, and, on acceptance, becomes the *acceptor*. C., to whom the bill is made payable, is called the *payee*. As the bill is made payable to C., or his order, he may, by endorsement, direct the bill to be paid to D., and, in that case, C. becomes the endorser, and D., to whom the bill is endorsed, is called the endorsee, or holder.

3. What is the character of a check ?—75

It is, in form and effect, a bill of exchange. It is not a direct promise by the drawer to pay, but it is an undertaking, on his part, that the drawee shall accept and pay, and the drawer is answerable only in the event of the failure of the drawee to pay. A check payable to bearer passes by delivery, and the bearer may sue on it as on an inland bill of exchange.

4. What are the principal requisites of a bill of exchange ?—75

It is not confined to any set form of words. A promise to *deliver*, or to be *accountable*, or to be responsible for so much money, is a good bill or note ; but it must be exclusively and absolutely for the payment of money. In England, negotiable paper must be for the payment of money

in specie, and not in bank notes. In this country it has been held, that a note payable in bank bills was a good negotiable note within the statute, if confined to a species of paper universally current as cash. But the doctrine of these cases has been met and denied, and I think the weight of argument is against them, and in favour of the English rule. The payment must not rest upon any contingency, except the failure of the general personal credit of the person drawing or negotiating the bill. It is not necessary that the note should be made at home. Foreign, as well as inland notes are negotiable. The instrument must be made payable to the payee, and to his order or assigns, or to bearer, in order to render it negotiable. It must have negotiable words on its face, showing it to have been the intention of the parties to give it a transferable quality. Without them it is a valid instrument as between the parties, and entitled to the three days of grace. The words *value received* though usually inserted, are unnecessary. Nor is it necessary that the maker should subscribe his name at the bottom of the note; and it is sufficient if the marker's name be on any part of it, as if it should run, I, *A. B.*, *promise to pay C. D., or order, one hundred dollars.* A note payable to a fictitious person may be sued on, by an innocent endorsee, as a note payable to bearer.

5. What are the principal rights of the holder of a bill or note?—79

Possession is *prima facie* evidence of property in negotiable paper, payable to bearer, or endorsed in blank, and such a *bona fide* holder can recover upon the paper, though it came to him from a person who had stolen or robbed it from the true owner, provided he took it innocently, in the course of trade, for a valuable consideration. There are but two cases in which a bill or note is void in the hands of an innocent endorsee for a valuable consideration; and these cases are, when the consideration in the instrument is money won at play, or it be given for a usurious debt.

6. Within what time must a bill be presented for acceptance?—82

There is no precise time fixed by law in which bills payable at sight, or by a given time, must be presented to the drawee for acceptance. The holder need not take the earliest opportunity. A bill payable at a given time after date, need not be presented for acceptance before the day of payment; but if presented, and acceptance is refused, it is dishonoured, and notice must then be given to the drawer. A bill payable sixty days after sight, means sixty days after acceptance, and such a bill, as well as a bill payable on demand, must be presented in a reasonable time, or the holder will have to bear the loss proceeding from his default.

7. How must the acceptance be made?—83

It may be by parol, or in writing, and general or special. Though a bill comes into the hands of a person with a parol acceptance, and he takes it in ignorance of such an acceptance, he may avail himself of it afterwards. If the acceptance be special, it binds the acceptor *sub modo*, and according to the acceptance. A parol promise to accept a bill already

drawn, or thereafter to be drawn, is binding if the bill be taken in consideration of promise. Every act giving credit to the bill amounts to an acceptance. The acceptance may be impliedly as well as expressly given. It may be inferred from the act of the drawee, in keeping the bill a great length of time, contrary to the usual mode of dealing.

8. What is the effect of a conditional acceptance?—84

The holder is not bound to receive any acceptance varying from the terms of the bill, but if he does receive it, the acceptor is not liable for more than he has undertaken. If a bill be accepted payable at a particular place, the holder is bound to make demand at that place.

9. What are the obligations of the acceptor of a bill?—86

The acceptance renders him the principal debtor, and the drawer the surety, and nothing will discharge the acceptor but payment or release. He is bound, though he accepted without consideration, and for the sole accommodation of the drawer. Accommodation paper is now governed by the same rules as other paper. These are the strict obligations of the acceptor in relation to the other parties to the bill, and they do not apply in all their extent as between the drawer and the party who endorses or lends his name to the bill as surety for the accommodation of the drawer.

10. What is an acceptance *supra protest?*—87

It is where a third person, after protest for non-acceptance by the drawee, intervenes, and becomes a party to the bill, in a collateral way, by accepting and paying the bill for the honour of the drawer, or of a particular endorser.

11. What are the obligations and rights of the acceptor *supra protest?*—87

He subjects himself to the same obligations as if the bill had been directed to him. He has his remedy against the person for whose honour he accepted, and against all the parties who stand prior to that person. If he takes up the bill for the honour of the endorser, he stands in the light of an endorsee paying for the value of the bill, and has the same remedies to which an endorsee would be entitled against all prior parties. There can be no other acceptor after a general acceptance by the drawee. A third person may become liable on his collateral undertaking, as guarantying the credit of the drawee, but he will not be liable as acceptor. It is said, however, that when the bill has been accepted, *supra protest*, for the honour of one party to the bill, it may, by another individual, be accepted, *supra protest*, for the honour of another. The holder is not bound to take an acceptance, *supra protest*, but he would be bound to accept an offer to pay, *supra protest*. The protest is necessary, and should precede the collateral acceptance or payment; and if the bill, on its face, directs a resort to a third person, in case of refusal by the drawee, such direction becomes a part of the contract.

11. What is the rule as to the transfer of bills by endorsement ?—88

A valid transfer may be made by the payee, or his agent. In case of a bill made or endorsed to a *feme sole*, who afterwards marries, the right to endorse it belongs to her husband. So, the assignee of an insolvent payee, or the executor or administrator of a deceased payee, are entitled to endorse the paper. And if a bill be made payable to a mercantile house consisting of several partners, an endorsement by one of them is deemed the act of the firm. If the bill be made payable to A., for the use of B., the legal title is in A., and he must endorse it. A bill cannot be endorsed for a part only of its contents, unless the residue has been extinguished.

12. What is the effect of a blank endorsement ?—89

A note endorsed in blank is like one payable to bearer, and passes by delivery, and the holder may constitute himself, or any other person, assignee of the bill. Even a bond payable to bearer, has been held to pass by delivery, in the same manner as a bank-note payable to bearer, or a bill of exchange endorsed in blank. The holder may strike out the endorsement to him, though in full, and all prior endorsements in blank, except the first, and charge the payee or maker.

13. How may the negotiability of a bill, originally so, be stopped ?—90

By a special endorsement by the payee, but no subsequent endorsee can restrain the negotiability of the bill. The first endorser is liable to every subsequent *bona fide* holder, even though the bill or note be forged, or fraudulently circulated.

14. What if a blank note or check be endorsed ?—90

It will bind the endorser to any sum, or time of payment, which the person to whom he intrusts the paper, chooses to insert in it. This only applies to the case in which the body of the instrument is left blank.

15. What is the rule where negotiable paper is taken after it is due ?—91

The presumption is against the validity of the demand, and the purchaser takes it at his peril, and subject to every defence existing against it before it was negotiated.

16. When is a note, payable on demand, deemed out of time ?—91

When the facts are ascertained, the reasonableness of time is a matter of law, and every case will depend on its circumstances. Eighteen months, eight months, seven months, five months, even two and a half, when unexplained by circumstances, have been held an unreasonable delay ; and if the demand be not made in a reasonable time by the holder, the endorser is discharged.

17. How must the demand for acceptance, and protest of a bill be made?—93

It is usually made by a notary, and in case of non-acceptance he protests it, and this notarial protest receives credit in all courts and places by the law and usages of merchants, without any auxiliary evidence; and it is a requisite step, by the custom of merchants, in the case of a foreign bill, and must be made promptly upon refusal. It must be made at the time, in the manner, and by the persons prescribed, in the place where the bill was payable. Protest of inland bills is not generally deemed necessary. Bills drawn in one state, on persons living in another state, are to be treated as foreign bills.—(2 *Peters' U. S. Rep.* 170.)

18. What is the rule as to notice of non-acceptance?—94

After the protest of non-acceptance, immediate notice must be given to the drawer and endorser, in order to fix them, and the omission would not be cured by the bill being presented for payment, and subsequent notice of non-payment, as well as non-acceptance. The drawer or endorser may be sued forthwith upon the protest for non-acceptance, without waiting until the bill be presented for payment, and refused.

19. How must demand of payment be made?—95

It must be made when the bill falls due, by the holder or his agent upon the acceptor, at the place appointed for payment, or at his house or residence, or upon him personally if no particular place be appointed, and it cannot be made by letter through the post office. The general principle is, that due diligence must be used to find out the party, and make demand; and the inquiry will always be, whether, under the circumstances of the case, due diligence has been used. If the party has absconded, that will as a general rule, excuse the demand. If he has changed his residence to some other place, within the same state or jurisdiction, the holder must make endeavours to find it, and make the demand there. If the person at whose house the note or bill is made payable, be the holder of the paper, it is sufficient for the holder to examine the accounts, and ascertain that the party who is to pay has no funds deposited.

20. What is the effect of the addition of memoranda to a bill or note, designating the place of payment?—98

There has been much litigation and difficulty in the cases. It is stated as a general rule, that a memorandum upon a note, as to where it should be payable, was no part of it; and in *Exon* v. *Russell*, (4 *Maule & Selw.* 505.) such a memorandum on the bottom of a note, was held to be no part of it. On the other hand, in *Cowie* v. *Halsall*, (4 *Barnw. & Ald.* 197,) after a bill had been accepted generally, the drawer, without the consent of the acceptor, added a place of payment, and it was held, that the addition was a material variation, and discharged the acceptor.

21. What if a bill drawn generally, be accepted specially?—99

It is a qualified acceptance which the holder is not bound to take; but if he does take it, the demand must be made at the place appointed and not elsewhere.

22. What is the rule as to the three days of grace ?—100

That they apply equally, according to the custom of merchants, to foreign and inland bills and to promissory notes, and as between the endorser and the endorsee of a negotiable note; and the acceptor has within a reasonable time of the end of business, or bank hours, of third day of grace, (being the third day after the paper falls due,) to pay. The three days of grace apply equally to bills payable at sight; but a bill or note payable on demand, or where no time of payment is expressed, is payable immediately on presentment, and is not entitled to the three days of grace.

23. What steps are requisite to fix the drawer and endorser of a bill or check ?—104

The holder must not only show a demand, or due diligence to get the money of the drawee of the bill or check, and of the maker of the note, but he must give reasonable notice of their default to the drawer and endorsers, to entitle himself to a suit against them. Notice to one of several partners, or to one of several joint drawers or endorsers, is notice to them all. The question of reasonable notice is usually compounded of law and fact, and proper for the decision of a jury, under the advice and direction of the court.

24. What is held to be reasonable notice ?—106

According to the modern doctrine, the notice must be given by the first direct and regular conveyance. This means, the first mail that goes after the day next to the third day of grace. Reasonable diligence and attention is all that the law enacts; and it seems to be now settled, that each party into whose hands a dishonoured bill may pass, shall be allowed one entire day for the purpose of giving notice. It is not necessary to send by the public mail. The notice may be sent by a private conveyance, or special messenger, and it would be good notice, though it should happen to arrive a little behind the mail. The notice, in all cases, is good, if left at the dwelling-house of the party, in a way reasonably calculated to bring the knowledge of it home to him; and if the house be shut up by a temporary absence, still notice may be left there. If the parties live in different towns, the letter must be forwarded to the post-office nearest to the party.

25. What is necessary to be expressed in the notice ?—108

It is sufficient that it state the fact of non-payment, and it is not nenecessary to state expressly, it is justly implied, that the holder looks to the endorser. It is sufficient for the agent to give notice to his principal of the dishonour of a bill, and it then becomes necessary for the principal

to give the requisite notice, with due diligence, to the parties to be fixed. The drawer or endorser, to be charged on non-acceptance or non-payment, is entitled to call for the protest, and the identical bill, or number of the set protested, before he is bound to pay.

26. In what cases is notice not required ?—110

If the drawee refuse to accept, because he has no effects of the drawer in his hands, notice to the drawer is not necessary. This exception to the general rule, is confined strictly to want of effects and to cases in which the drawer had no right to expect that his bill would be honoured. The exception applies only to the drawer. Neither the insolvency of the drawer, or drawee, or acceptor, or the fact that the drawee had absconded does away with the necessity of demand of payment, and notice to the drawer and endorser. If a bank check be taken in the ordinary course of business, it is not an absolute payment, but only the means to procure the money, and the holder is bound to present it for payment with ordinary diligence, and the next day will be in season. But if the bank be totally prohibited, by process of law, from the exercise of its functions, before the check can, with due diligence, be presented, no demand need be made, or notice given; and the holder may waive the check altogether, and resort to his original demand. So, if the maker of the check has no funds at the bank at the date of the check, it need not be presented for payment previous to a suit upon it.

27. What if delay be given to the drawee of a bill or maker of a note ? —111

It will discharge the other parties, but the agreement for delay must be one having a sufficient consideration, and binding in law upon the parties; mere indulgence will work no prejudice. Simply forbearing to sue the acceptor, or taking collateral security from him, is no discharge; but giving him new credit and time, or accepting a composition in discharge of the acceptor, will produce that result. The principal is, that the drawer and endorser are in the light of sureties for the acceptor, and the holder must do nothing to impair the right which they have to resort by suit to the acceptor for indemnity, or which would amount to a breach of faith in him towards the acceptor.

28. What is the above rule understood to require ?—112

That the holder shall not so deal with the acceptor of the bill, or maker of the note, by giving time, or compounding, or giving credit, as to prejudice the right of the other parties to the bill, without their assent. The holder may give time to an immediate endorser, and proceed against the parties behind him. A prior party to a bill is not discharged by a release of a subsequent party. But the holder cannot reverse this order.

29. What acts of the endorser or drawer will amount to a waver of notice ?—113

A subsequent promise to pay, or the taking of collateral security.

30. What if an endorser comes again in possession of the bill?—114

He will be regarded *prima facie* as the owner, and may sue and recover, though there be on it subsequent endorsements.

31. What will discharge the acceptor?—114

Nothing short of the statute of limitations, or payment, or a release, or an express declaration of the holder. He is bound, like the maker of a note, as a principal debtor. His acceptance is evidence that the value of the bill was in his hands, or had been received by him from the drawer. He is liable to the payee, to the drawer, and to every endorser. He is liable to an innocent holder, though the drawer's hand be forged, and in the suit against him it is not necessary to prove any hand but that of the first endorser.

32. What is the usual course, in Europe, pursued by the holder of a protested bill in order to procure indemnity?—115

The general law merchant authorizes the holder to redraw from the place where the bill was payable, on the drawer or endorser, in order to reimburse himself for the principal of the bill protested, the contingent expenses attending it, and the new exchange which he pays.

33. What is the rule in this country?—117

The proper rule in cases of debt payable in a foreign country, in England, for instance, and sued in the United States, is to allow that sum in the currency of the country which approximates most nearly to the amount to which the party is entitled in the country where the debt was payable, and calculated by the established par of exchange; and in the United States, the pound sterling is valued at $4,80. But the creditor is also entitled to have an amount equal to what he must pay, in order to *remit* it to the place where it was payable. He ought to have just as much allowed him where he sues, as he would have had if the contract had been duly performed.

34. What is a mercantile guaranty?—121

It is a promise to answer for the payment of some debt or duty, in case of the failure of another person, who is in the first instance liable.

35. What are the legal rules governing a mercantile guaranty?—121

The English statute of frauds, which has been adopted throughout this country, requires, that "upon any special promise to answer for the debt, default, or miscarriage of another person, the agreement, or some memorandum thereof, must be in writing, and signed by the party, to be charged therewith, or some other person thereunto by him lawfully authorized." An agreement to become a guarantor, is within the statute; and if it be a

guaranty for the subsisting debt or engagement of another person, not only the engagement, but the consideration must be in writing.

36. What are the rights and duties of the respective parties to a mercantile guaranty?—123

The doctrine in the case of negotiable paper, as to demand and notice, has a feeble and qualified application to the guarantor. Thus it has been held, that the guarantor of a note could be discharged by the laches of the holder, as by neglect to make demand of payment of the maker, and to give notice of non-payment to the guarantor, provided the maker was solvent when the note fell due, and became insolvent afterwards. And in the case of the absolute guaranty of the payment of a note, no demand or notice is requisite to fix the guarantor.

LECTURE XLV.

OF THE TITLE TO MERCHANT VESSELS.

1. What are the requisites to a title to a ship?—130

A bill of sale is the true and proper muniment of title, and one which the maritime courts of all nations will look for, and, in their ordinary practice, require. In Scotland, a written conveyance of property in ships, has, by custom, become essential; and, in England, it is made absolutely necessary by statute, as to British subjects. Possession of a ship, and acts of ownership, will, in this, as in other cases of property, be presumptive evidence of title, without the aid of documentary proof, and will stand good until that presumption be destroyed by contrary proof; and a sale and delivery of a ship, without a bill of sale, or instrument, will be good at law, as between the parties. Upon the sale of a ship, in port, delivery of possession is necessary to make the title perfect. If the buyer suffers the seller to remain in possession, and act as owner, and the seller should become bankrupt, the property would be liable to his creditors, and, in some cases, also to judgment creditors on execution. The same rule exists in the case of the mortgage of the ship; but where a sale is by a part owner, it is similar to the sale of a ship at sea, and actual delivery can not take place. Delivery of the instruments of title will be sufficient, unless the part owner be himself in actual possession. If the ship be sold while abroad, or at sea, a delivery of the grand bill of sale, and other documents, transfers the property, as in the case of the delivery of the key of a warehouse.

2. What is understood by the grand bill of sale?—133

The instrument whereby the ship was originally transferred from the builder to the owner, or first purchaser.

3. What will constitute a person owner for the purpose of charging him for necessaries and repairs?—133

The ownership, in relation to this subject, is not determined by the register, and the true question, in matters relating to repairs, is, upon whose credit was the work done? Nor is a regular bill of sale of property essential to exempt the former owner from responsibility for supplies furnished. But where the contract of sale is made, and the possession delivered, the circumstance that the naked legal title remains in the vendor for his security, does not render him liable, as owner, on contracts, or for the conduct of the master.

4. How is the liability of mortgagees considered?—134

It has been a disputed question, whether the mortgagee of a ship, before he takes possession, be liable to the burdens and entitled to the benefits belonging to the owner. In the case of *Chinney* v. *Blackbourne*, (1 *H. Blacks.*, 117,) it was held, that the mortgagor was to be deemed owner, and entitled to the freight, and liable for the repairs and other expenses. The same decision was made by the C. B. in *Jackson* v. *Vernon*, (1 *H. Blacks.*, 114.) But Lord Kenyon, in *Westerdell* v. *Dale*, (17 *Term Rep.*, 306,) entertained a different opinion, and he considered the mortgagee, whether in or out of possession, to be entitled to freight, and bound for the expenses of the ship. In *Dean* v. *M'Ghie*, (4 *Bingham*, 45,) it was held, that on a mortgage of a ship, the accruing freight passed to the mortgagee. The weight of American authority, has been in favour of the position, that a mortgagee of a ship out of possession is not liable for repairs or necessaries furnished. To whom was the credit given, seems to be the ground on which the question ought to stand. In a case before Lord Ellenborough, in 1816, he ruled, that a mortgagee, not in possession, and not known to the plaintiff, was not liable for stores supplied by the captain's order.—(1 *Starkie's Rep.*, 366.)

Registered ownership, is *prima facie* evidence of liability for repairs of a ship, but it may be rebutted by showing that the credit was given elsewhere.

5. In what cases is the charterer liable for supplies furnished the ship? —137

The question in these cases is, whether the owner, by reason of the charter party, has divested himself of the ownership *pro hac vice*, and whether there has been any direct contract between the parties, varying the responsibility.

In *Vallejo* v. *Wheeler*, (*Cowp. Rep.*, 143,) the court proceeded on the ground, that the charterer was owner *pro hac vice*, inasmuch as he appointed the master. The question of responsibility depends upon the in-

quiry, whether the lender or hirer, under a charter party, be the owner of the ship for the voyage. If the general owner retains the command and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter party is a mere affreightment sounding in covenant, and the freighter hires the possession, command, and navigation of the ship, he becomes the owner, and is responsible for the conduct of the master and mariners; and the general owner has no lien for freight.

6. What is necessary under the registry acts in order to entitle a vessel to the privileges of a United States ship?—141

No vessel is deemed a vessel of the United States, nor entitled to the privileges of one, unless registered, and wholly owned and commanded by a citizen of the United States. The American owner in whole, or in part, ceases to retain his privileges as such owner, if he usally resides in a foreign country, during the continuance of such residence, unless he be a consul, or agent for, and a partner in some American house, carrying on trade within the United States. The register is to be made by the collector of the port to which the vessel belongs, or in which it shall be, and founded on the oath of the owners, stating the time and place where she was built, or that she was captured in war by a citizen, as prize, and lawfully condemned; and stating the owners and master, and that they are citizens, and that no subject of a foreign power is, directly or indirectly by way of trust, or otherwise, interested therein. Previous to the rigistry, a certificate of survey is to be produced, and security given, that the certificate of such registry shall be solely used for the ship, and shall not be sold, lent, or otherwise disposed of. If the vessel, or any interest therein, be sold to a foreigner, and the vessel be within the United States, the certificate of the registry shall, within seven days after the sale, be delivered up to the collector of the district, and if the sale be made when the vessel is abroad, or at sea, the certificate is to be delivered up within eight days after the master's arrival within the United States; and if the transfer be made to a foreigner in a foreign port, for the purpose of evading the revenue laws of the foreign country, it works a forfeiture of the vessel, unless the transfer be made known within eight days after the return of the vessel, to a port in the United States, by a delivery of the certificate of registry to the collector of the port. So, if a registered ship be sold, in whole or in part, while abroad, to a citizen of the United States, the vessel on her first arrival, in the United States thereafter, shall be entitled to all the privileges of a ship of the United States, provided a new certificate of registry be obtained within three days after the master makes his final report upon her first arrival. If the vessel be built in the United States, the ship-carpenter's certificate is requisite to obtain the register.

7. What form is requisite in the transfer of American ships?—143

There must be some instrument in writing in the nature of a bill of sale, which shall recite at length the certificate of registry, and without it

the vessel is incapable of being registered anew. Upon every change of master, the owner must report such change to the collector.

8. What are the rules prescribed in regard to the coasting trade? —144

In order to obtain a licence to carry on the coasting trade, or fisheries, the owner, or the ship's husband, and master, must give security to the United States, that the vessel be not employed in any trade whereby the revenue of the United States may be defrauded; and the master must make oath that he is a citizen, and that the license shall not be used for any other vessel, or any other employment; and if the vessel be less than twenty tons burthen, and, that she wholly the property of a citizen of the United States. The collector thereupon grants a license to carry on the coasting trade, or fishery. Vessels engaged in such trade or business, without being enrolled or licensed, or licensed only, as the case may be, shall pay alien duties, if in ballast, or laden with goods the growth or manufacture of the United States, and shall be forfeited if laden with any articles of foreign growth or manufacture, or distilled spirits.

9. In what relation do part owners of a ship stand towards each other? —151

As tenants in common. Each has his distinct, though undivided interest; and when one of them is appointed to manage the concerns of the ship he is termed the ship's husband.

10. How is the employment of the ship regulated?—151

If there be no certain agreement among the owners; the Court of Admiralty, authorizes a majority in value of the part owners, to employ the ship upon any probable adventure, and, at the same time, takes care to secure the interest of the dissenting minority. In such case, the ship sails wholly at the charge and risk, and for the benefit of the majority. If the part owners are equally divided in respect to the employment of the ship, either party may obtain the like security from the other seeking to employ her. The court may decree a sale where the parties are equally divided.

11. What is the rule as to the joint responsibility of part owners? —156

That they are responsible *in solido*, as partners, for repairs and necessary expenses relating to the ship, and incurred on the authority of the master or ship's husband. But where a ship has been duly abandoned to separate insurers, they are not responsible to each other as partners, but each one is answerable for the previous expenses of the ship, ratably to the extent of his interest as an insurer, and no further.

LECTURE XLVI.

OF THE PERSONS EMPLOYED IN THE NAVIGATION OF MERCHANT SHIPS.

1. What are the qualifications which the master should possess ?—158

He must be a person of experience and practical skill, as well as deeply initiated in the theory of navigation. He must have the talent to command in the midst of danger, and presence of mind to meet and surmount extraordinary perils. He must be able to dissipate fear, to calm disturbed minds, and to inspire confidence, in the breasts of all who are under his charge. He must watch for the preservation of the health and comfort of the crew, as well as for the preservation of the ship. It is necessary that he should maintain perfect order, and preserve the most exact discipline, under the guidance of justice, moderation, and good sense. Charged frequently with the sale of the cargo, and the re-investment of the proceeds, he must be fitted to superadd the character of merchant to that of commander ; and he ought to have a general knowledge of the marine law, and of the rights of belligerents, and the duties of neutrals, so as not to expose to unnecessary hazard the persons and property under his protection.

2. What authority may the master exerise ?—161

As he is the confidential agent of the owners, he has an implied authority to bind them, without their knowledge, by contracts relative to the usual employment of the ship. He may, by charter-party, bind the ship and freight. This he may do in a foreign port in the usual course of the ship's employment ; and this he may also do at home, if the owner's consent can be presumed. The ship and freight are, by the marine law, bound to the performance of the contract. The master can bind the owners, not only in respect to the usual employment of the ship, but in respect to the means of employing her. His power relates to the carriage of goods, and the supplies requisite for the ship, and he can bind the owner personally as to repairs and necessaries for the ship. But the supplies must appear to be reasonable, or the money advanced for the purchase of them to have been wanting. The master when abroad, and in the absence of the owner, may hypothecate the ship, freight, and cargo, to raise money requisite to complete the voyage. He may, also, if necessary, in the course of the voyage, sell a part of the cargo, to enable him to carry on the residue.

3. What is the law as to the master's right of lien on the ship ?—165

It is settled that the master has no lien on the ship, freight, and cargo, for any debt of his own, as for wages, or stores furnished, or repairs done

at his expense, either at home or on the voyage. The captain is distinguished from all other persons belonging to the ship, and he is considered as contracting personally with the owners, while the mate and mariners contract with the master on the credit of the ship. He can hypothecate and create a lien in favour of others, but he himself must stand on the personal credit of his owners. The doctrine of the English law, remains yet to be definitely declared and settled in this country. The case of the ship *Grand Turk*, (1 *Paine's Rep.*, 72,) is a decision in the Circuit Court of the United States for New York, on the point, that the master's wages and perquisites were no lien on the ship; and it was also ruled in *Fisher v Willing*, (8 *Serg. & Rawle*, 118. But, in the Circuit Court of the United States, for Massachusetts, (3 *Mason's Rep.*, 255,) the rule was laid down, that the master had a lien upon the freight for all his advances and responsibilities abroad upon account of the ship. In *Ingersoll* v. *Van Bokkelin*, (7 *Cowen*, 670. 5 *Wendell*, 314, *S. C.*,) it was decided after a review of the American authorities, that the master had a lien on the freight and cargo for his necessary advances made, and responsibilities incurred, in a foreign port. It is clearly the rule of the maritime law, that the owner of the cargo, sold by the master for the necessaries of the ship, has an implied lien upon the ship for his indemnity, though there be no express hypothecation.

4. What is the rule as to the pilotage ?—175

That it is the duty of the master engaged in a foreign trade, to put his ship under the charge of a pilot, both on his outward and homeward voyage, when he is within the usual limits of the pilot's employment. But if the master, at a foreign port, attempts to get a pilot and fails, and then, in the exercise of his best discretion, endeavours to navigate himself into port, and grounds, the underwriter is not discharged, but remains liable for the injury.—(2 *Barnw. & Adolph*, 380.)

5. How far does the responsibilities of pilots extend ?—176

The pilot, while on board, has the exclusive control of the ship. He is considered as master *pro hac vice*, and if any injury or loss be sustained in the navigation of the vessel, while under the charge of pilot, he is answerable, as strictiy as if he were a common carrier, for his default, negligence, or unskilfulness; and the owner would also be responsible to the party injured by the act of the pilot, as being the act of his agent.

6. What are the principal provisions prescribed by congress in regard to seamen employed in the merchant service ?—177

That every seaman or mariner, on all voyages from the United States, to a foreign port, and, in certain cases, to a port in another state, other than the adjoining one, shall sign shipping articles, which are contracts in writing or in print, declaring the voyage and the term of time for which the seaman are shipped, and when they are to render themselves on board. If there be no such contract, the master is bound to pay to every seaman

who performs the voyage, the highest wages given at that port for a similar voyage, within the three next preceding months, besides forfeiting for every seaman, a penalty of twenty dollars. The seamen are made subject to forfeitures if they do not render themselves on board according to the contract, or if they desert the service; and they are liable to summary imprisonment for desertion, and to be detained until the ship be ready to sail. If the mate and a majority of the crew, after the voyage is begun, but before the vessel has left the land, deem the vessel unsafe, or not duly provided, and shall require an examination of the ship, the master must proceed to, or stop at, the nearest or most convenient port, where an inquiry is to be made. If the complaint shall appear to be groundless, the expenses and reasonable damages to be ascertained by the judge, are to be deducted from the wages of the seaman. But if the vessel be found or made sea-worthy, and the seamen shall refuse to proceed on the voyage, they are subjected to imprisonment until they pay double the advance made them on the shipping contract. Fishermen engaged in the fisheries are liable to the like penalties for desertion; and the fishing contract must be in writing, signed by the shipper and the fishermen, and countersigned by the owner.

7. What is provided in regard to wages?—178

That one-third shall be due at every port at which the vessel shall unlade and deliver her cargo, before the voyage be ended; and at the end of the voyage, the seamen may proceed in the District Court, by admiralty process, against the ship, if the wages be not paid within ten days after they are discharged.

8. What is provided for the health and safety of seamen?—179

That every ship belonging to a citizen of the United States, of the burthen of one hundred and fifty tons, or upwards, navigated by ten or more persons, and bound to a foreign port; or of the burthen of seventy tons, or upwards, and navigated by six or more persons, and bound from the United States to the West Indies, shall be provided with a medicine chest, properly supplied with fresh and sound medicines; and if bound across the Atlantic ocean, with requisite stores of water, and salted meat, and wholesome ship bread, well secured under deck. And it is further provided, for the purpose of affording relief to sick and disabled seaman, that a fund be raised out of their wages, earned on board of any vessel of the United States, and be paid by the master to the collector of the port, on entry from a foreign port, at the rate of twenty cents per month for every seamen. It is also made the duty of the American consuls and commercial agents, to provide for those seamen who may be found destitute within their consular districts, and for their passages to some port in the United States, in a reasonable manner, at the expense of the United States. So, if an American vessel be sold in a foreign port, and her company discharged, or a seaman be discharged without his consent, the master must pay to the consul or commercial agent at the place, three months pay, over and above the wages then due, for every such seaman, two-thirds

of which is to be paid over to every seamen so discharged, upon his engagement on board of any vessel to return to the United States.

9. How far has the master authority over the seaman ?—181

He may imprison, and also inflict reasonable corporal punishment upon a seaman, for disobedience to reasonable commands,or for disorderly, riotous, or insolent conduct; and his authority, in that respect, is analogous to that of a master on land over his apprentice or scholar. He may discharge a seaman for just cause, and put him on shore in a foreign country; but the cause must not be slight, but aggravated, such as habitual disobedience, mutinous conduct, theft, or habitual drunkenness; and he is responsible in damages if he discharge him without justifiable cause. This power extends to the mate and subordinate officers.

10. What is the maritime law as to the expense attending sick and disabled seamen during the voyage ?—184

It was decided in *Harden* v. *Gordon*, (2 *Mason's Rep.* 541,) that the expense of curing a sick seaman in the course of the voyage, was a charge upon the ship, according to the maritime law of Europe.

11. What is the rule as to seamen's right to extra wages ?—185

That every seaman engaged to serve on board a ship, is bound, from the terms of the contract, to do his duty in the service to the utmost of his ability, and, therefore, a promise made by the master when the ship is in distress, to pay extra wages, as an inducemcnt to extraordinary exertion, is illegal and void. It requires the performance of some service not within the scope of the original contract, as by becoming a voluntary hostage upon capture, to create a valid claim, on the part of the seaman, to compensation, on a promise by the master, beyond the stipulated wages. So, no wages can be recovered when the hiring has been for an illegal voyage, or one in violation of a statute.

12. What is the rule as to wages where a seaman is unable to render his service by sickness or bodily injury, happening during the voyage ?—186

That he is entitled to his whole wages for the voyage. He will be equally entitled to his wages to the end of the voyage, when wrongfully discharged by the master during the course of it. If the seaman be wrongfully discharged on the voyage, the voyage is then ended with respect to him, and he is entitled to sue for his full wages for the voyage.

13. What is the general rule as to wages ?—187

The general principle of the marine law is, that freight is the mother of wages, and if no frieght be earned, no wages are due. This principle protects the owner, by making the right of the mariner to his wages, commensurate with the right of the owner to his freight; but that the rule may duly apply, the freight must not be lost by the fraud or wrongful act

of the master. The policy of the rule applies to cases of loss of freight by a peril of the sea.

Seamen's wages, in trading voyages, are due *pro rata itineris.*

14. What is the rule where a seaman dies on the voyage?—189

There is no settled English rule on the subject of his wages. In one case, the court intimated, that his representatives might be entitled to a proportion of his wages up to his death, when the hiring was by the month. In this country, there has been contradictory decisions on the point. In the Circuit and District Courts of the United States, for Pennsylvania, it was decided, that the representatives of a seaman dying on the voyage, were entitled to full wages to the end of the voyage. On the other hand, it was subsequently decided, in the District Court for South Carolina, and in the District Court for Massachusetts, that full wages, by the marine law, meant only the full wages up to the death of the mariner.

15. What effect has capture upon wages?—191

Capture by an enemy extinguishes the contract for seamen's wages; and Sir William Scott, in the case of *The Friends*, (4 *Rob. Adm. Rep.* 143,) held, that the re-capture of the vessel did not revive the right, or restore him to his connection with the ship, inasmuch as he was not on board at the re-capture, and did not render any subsequent service. The doctrine of this case was overruled in *Bergstrom* v. *Mills*, (3 *Esp. N. P. Rep.* 36,) and the American decisions have fully discussed the question, and they lay down a different rule, and proceed on the just principle, that the owner recovers his freight, and that is the parent of wages. Whenever freight is earned, wages are due, and must be paid.

16. What is the law in cases of injuries produced by the misconduct of any of the crew?—194

They are bound to contribute out of their wages. But the circumstances must be such as to fix the wrong upon some of the crew; and then, if the individual be unknown, those of the crew, upon whom the presumption of guilt rests, stand as sureties for each other, and they must contribute ratably to the loss. If the embezzlement be fixed upon any individual, he is wholly responsible.

17. How is the lien of seamen for wages regarded by the marine law?—196

Few claims are more highly favoured and protected by law, and when due, the vessel, owners, and master are liable for the payment of them. The seamen need not libel the vessel at the immediate port where they are discharged. They may disregard bottomry bonds, and pursue their lien for wages afterwards, even against a subsequent *bona fide* purchaser. There is no difference between a vessel seized abroad and restored in specie or in value; the lien attaches to the thing, and whatsoever is substituted for it.

18. What causes work a forfeiture of wages ?—198

Desertion from the ship without just cause, or the justifiable discharge of a seaman by the master. But the forfeiture is saved if the seaman repents, and makes compensation, or offer of amends, and is restored to his duty.

LECTURE XLVII.

OF THE CONTRACT OF AFFREIGHTMENT.

1. What is a charter party ?—200

It is a contract of affreightment in writing, by which the owner of a ship lets the whole, or a part of her, to a merchant, for the conveyance of goods, on a particular voyage, in consideration of the payment of freight.

2. What does the charter party usually contain ?—202

It describes the parties, the ship, and the voyage, and contains, on the part of the owner, a stipulation as to sea-worthiness, and as to the promptitude with which the vessel shall receive the cargo, and perform the voyage; and the exception of such perils of the sea for which the master and ship owners do not mean to be responsible. On the part of the freighter, it contains a stipulation to load and unload within a given time, with an allowance of so many lay, or running days, for loading the cargo, and the rate and times of payment of the freight, and rate of demurrage beyond the allotted days.

3. What is the duty of the owner of a chartered ship ?—203

It is his duty not only to see that she is duly equipped, and in suitable condition to perform the voyage, but he is bound to keep her in that condition throughout the voyage, unless he be prevented by perils of the sea. If, in consequence of a failure of equipment of the vessel, the charterer does not employ her, he is not bound to pay freight; but if he actually employs her, he must pay the freight, though he has his remedy on the charter party for damages sustained, by reason of the deficiency of the vessel in her equipment.

4. What is understood by *demurrage ?*—203

The extra lay days, (being the days allowed to load and unload the cargo,) are called days of *demurrage;* and that term is likewise applied

to the payment for such delay, and it may become due either by the ship's detention, for the purpose of unloading or loading the cargo, either before, or during, or after the voyage, or in waiting for convoy.

5. What is the rule as to sea-worthiness?—204

The owner is bound to see that the ship be seaworthy, which means that the vessel must be tight, staunch, strong, well furnished, manned, victualled, and, in all respects, equipped in the usual manner, for the merchant service in such a trade. The ship must be fit and competent for the sort of cargo, and the particular service for which she is engaged. If there should be a latent defect in the vessel, unknown to the owner and undiscoverable upon examination, yet the better opinion is, that the owner must answer for the damage occasioned by that defect. The owner is also obliged to see that the ship be furnished with all the requisite papers according to the laws of the country to which she belongs, and according to treaties, and the law of nations.

6. What is understood by a bill of lading?—207

It is an acknowledgment by the master of the receipt of the goods on board, and of the conveyance of them which he assumes.

7. What does it contain?—207

It contains the quantity and marks of the merchandise, the names of the shipper and consignee, the places of departure and discharge, the name of the master, and of the ship, with the price of freight. By the bill of lading, the master engages as a common carrier to carry and deliver the goods to the consignee, or his order; and by the common law, owners were responsible for damages to goods on board, to the full extent of the loss. There are commonly three bills of lading; one for the freighter, another for the consignee, factor, or agent abroad, and one is usually kept by the captain for his own use. It is the document and title of the goods sent; and, as such, if it be to order, or assigns, is transferable in the market.

8. What is the effect of an endorsement of the bill of lading?—207

The endorsement and delivery of it, transfers the property in the goods from the time of the delivery. The *bona fide* holder of the bill of lading endorsed by the consignee is entitled to the goods, if he purchased it for a valuable consideration.

9. What are the obligations of the master of a chartered ship during the voyage?—209

When the voyage is ready, he is bound to sail as soon as the wind and tide will permit; but he ought not to set out in very tempestuous weather. He is bound, likewise, to proceed to the port of delivery without delay, and without any unnecessary deviation from the direct and usual

course. If he covenants to go to a loading port, by a given time, he must do it, or abide the forfeiture, and if he be forced out of his regular course, he must regain it with as little delay as possible.

10. What cause will justify a deviation?—209

Nothing but some necessary cause, as to avoid a storm, or pirates, or enemies, or to procure requisite supplies or repairs, or to relieve a ship in distress. In cases of necessity, as where the ship is wrecked, or otherwise disabled in the course of the voyage, and cannot be repaired, or cannot under the circumstances, without too great delay and expense, the master may procure another competent vessel to carry on the cargo and save his freight.

11. What if the ship be captured during the voyage?—213

The master is bound to render his exertions to rescue the property from condemnation, by interposing his neutral claims, and exhibiting all the documents in his power for the protection of the cargo.

12. What is the rule as to the delivery of the goods at the port of destination?—215

The general rule is, that delivery at the wharf, discharges the master. But the reasonable qualification of the rule is, that there must be a delivery at the wharf to some person authorized to receive the goods, or due previous notice must have been given to the consignee of the time and place of delivery.

13. What causes will excuse the ship-owner and master for the non-delivery of the cargo?—216

They are liable as common carriers, in all the strictness and extent of the common law, and can only be excused by events falling within one of the expressions "act of God and public enemies," or some cause expressly provided for in the charter party.

14. What is meant by perils of the sea?—216

They denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. A *casus fortuitus* was defined by the civil law to be *quod damno fatali contingit, cuivis diligentissimo possit contingere.* It is a loss happening in spite of all human effort and sagacity.

15. What are the duties of the shipper?—218

To use the ship in a lawful manner, and for the purpose for which it was let.

16. What is meant by freight?—219

In the common acceptation of the term, it means the price for the actual transportation of goods by sea from one place to another; but, in its more extensive sense, it is applied to all rewards or compensation paid for the use of ships.

17. What is meant by dead freight?—219

If the merchant agrees to furnish a return cargo, and he furnishes none, and lets the ship return in ballast, he must make compensation to the amount of the freight; and this is sometimes termed dead freight, in contradistinction to freight due for the actual carriage of goods.

18. What is the rule as to the owner's lien for freight?—220

If there be no express agreement in the case, the master is not bound to part with the goods until the freight be paid, but if he refuses to deliver the goods for other cause than non-payment of freight, he cannot avail himself of the want of tender. When the regulations of the revenue require the goods to be landed and deposited in a public warehouse, the master may enter them in his own name, and preserve the lien. The ship is bound to the merchandise and the merchandise to the ship, according to the language of Cleirac. The ship-owner's lien for freight is gone when the charterer is constituted owner, and takes exclusive possession for the voyage, or when payment of the freight is, by agreement, postponed beyond the time, or at variance with the time and place, for the delivery of the goods. But without a plain intent to the contrary, the ship-owner will not be presumed to have relinquished his lien on the cargo for the freight, notwithstanding he has chartered the vessel to another. If goods by the bill of lading, were to be delivered to B., or his assigns, he or they paying freight, and the assignee receives the goods, he is responsible to the master for freight, under the implied undertaking to pay it. So, if the master delivers the goods without payment of freight, he may sue the consignee to whom the goods were delivered. If he cannot recover his freight of the consignee, he still has his remedy over on the charter party against the shipper.

19. What if a ship be prohibited by the government of the country from entering at the port of delivery, and the cargo be brought back?—222

If the prohibition took place after the commencement of the voyage, the freight for the outward voyage, has been held to have been earned. Nothing can be more just, observes Valin, than that the outward freight should be allowed, in such a case, since the interruption proceeds from an extraordinary cause, independent of the ordinary maritime perils. The case of a blockade or interdiction of commerce with the port of discharge, is held to be different; for in that case, the voyage is deemed to be broken up, and the charter party dissolved; and if the cargo, by reason of that obstacle, be brought back, no freight is due. The same principle applies if the voyage be broken up and lost, by capture on the passage. On the other hand, an embargo detaining the vessel at the port of departure, or in the

course of the voyage, does not, of itself, work a dissolution of the contract. It is requisite that the ship break ground, to give an inception to freight.

20. What if the goods become so diminished in value, during the voyage, as not to be worth the freight?—224

The consignee is bound to take the goods and pay the freight. The ship-owner performs his engagement when he carries and delivers the goods. The right to his freight then becomes absolute. It may impair the remedy which his lien afforded, but it does not affect his personal demand against the shipper.

21. In what cases does the question of ratable freight arise?—227

1. When the ship has performed the whole voyage, and has brought only a part of her cargo to the place of destination. 2. When the ship has not performed her whole voyage, and the goods have been delivered to the merchant, at a place short of the port of delivery. In the case of a general ship, or one chartered for freight, to be paid according to the quantity of goods, freight is due for what the ship delivers. But if the ship be chartered at a specific sum for the voyage, the stipulated voyage must be actually performed. A partial performance is not sufficient, nor can a partial payment of freight be claimed except in special cases. If, however, the merchant accepts the goods at the intermediate port, the general rule of the marine law is, that freight is to be paid according to the proportion of the voyage performed, and the law will imply such a contract; and it is now settled in the English and American law, that freight, *pro rata itineris*, is due, when the ship, by inevitable necessity, is forced into a port short of her destination, and is unable to prosecute the voyage, and the goods are there voluntarily accepted by the owner. Such an acceptance constitutes the basis of the rule for a *pro rata* freight.

22. How is a loss by the collision of ships adjusted?—230

When the fact is clear, that a fault has been committed by one party, or that he was in want of due skill or care, and the loss was the consequence thereof, the party in fault must pay all the damages.

23. What are the nautical rules, by which want of care may be ascertained?—230

In most cases they are as follows. The vessel that has the wind free, or is sailing before or with the wind, must get out of the way of the vessel that is close-hauled, or sailing by or against it. The vessel on the starboard tack has a right to keep her wind, and the vessel on the larboard tack is bound to bear up or heave about to avoid danger, or be answerable for the consequences. The vessel to windward is to keep away when both vessels are going the same course in a narrow channel, and there is danger of running afoul of each other. But in the case of a steam vessel, which has greater power, and is more under command, she is bound to give way to a vessel with sails, in case of collision.

24. What is meant by *general average?*—232

General, gross, or extraordinary average, means a contribution made by all parties in interest, for the benefit of all; and it is called general, or gross average, because it falls upon the gross amount of the ship, cargo, and freight.

25. What constitutes the ground of a general average?—233

The goods must not be swept away by the violence of the waves, for then the loss falls entirely upon the merchant or his insurer, but they must be intentionally sacrificed by the mind and agency of man for the safety of the ship, and residue of the cargo. The *jettison* must be made for sufficient cause, and not from groundless timidity. It must be made in a case of extremity, when the ship is in danger of perishing by the fury of the storm, or is labouring upon the rocks and shallows, or is closely pursued by pirates or enemies; and then, if the ship, and the residue of the cargo, be saved by means of the sacrifice, nothing can be more reasonable than that the property saved should bear its proportion of the loss. To avoid an absolute shipwreck, it may sometimes be necessary to run the vessel on shore in a place which appears to be the least dangerous; and that will form a case of general average.

26. What things are the proper subjects for a general average?—235

If a ship be injured by perils of the sea, and be obliged to go into port to refit, the wages and provisions of the crew, during the detention, constitute the subject of a general average; the necessary expenses of going into port, and of preparing for refitting the ship, by unloading, warehousing, and re-loading the cargo, are general average. The cost of the repairs, so far as they accrue to the ship alone as a benefit, and would have been necessary in that port, on account of the ship alone, are not average. The wages and provisions of the crew, during capture and detention for adjudication, are the subject of general average. If part of the cargo be voluntarily delived up to a pirate, or an enemy, by way of ransom or contribution, and to induce him to spare the vessel and the residue of the goods, the property saved must contribute to the loss, as being the price of the safety to the rest. If masts, cable, and other equipments of the vessel be cut away, to save her in a case of extremity, their value must be made good by contribution.

27. What goods are subject to contribution, in cases of general average?—240

The general doctrine is, that all merchandise, of whatever kind or weight, or to whomsoever belonging, contributes. The contribution is made, not on account of encumbrance to the ship, but of safety obtained, and, therefore, bullion and jewels put on board as merchandise, contribute according to their full value. Goods shipped on deck contribute if saved, but if lost by jettison, they are not entitled to the benefit of general average. The common rule, according to Magens, is, that what articles pay

freight must contribute, and what pay no freight pay no average. Instruments of defence and provisions do not contribute, nor do wages of seamen contribute. Goods sold for the necessities of the ship, are the subject of general average.

28. What is the general rule for settling general average ?—242

That the goods sacrificed, as well as the goods saved, are to be valued at the clear net price they would have yielded, after deducting freight, at the port of discharge. The value of the vessel lost is estimated according to her value at the port of departure, making a reasonable allowance for wear and tear, on the voyage up to the time of the disaster.

29. What is meant by salvage ?—245

The compensation allowed to persons by whose assistance a ship or its cargo has been saved in whole or in part from impending danger, or recovered from actual loss, in cases of shipwreck, derelict, or re-capture.

30. What amount is usually allowed for salvage ?—245

The courts are liberal in the allowance of salvage in meritorious cases, as a reward for the service, and as an incentive to effort; and the allowance fluctuates between one half, one third, and one fourth of the net proceeds of the property saved, but one third has been the most usual rate. In general, neither the master, nor a passenger, seaman, or pilot, is entitled to compensation in the way of salvage, for the ordinary assistance he may afford a vessel in distress. Yet if the ship has been abandoned so as to discharge a seaman from his contract, and he subsequently contributes to the preservation of the vessel, he will be entitled to salvage.

31. What will work a dissolution of the contract of affreightment, without a performance ?—248

If the voyage becomes unlawful, or impossible to be performed, or if it be broken up, either before or after it has actually commenced, by war, or interdiction of commerce with the place of destination the contract is dissolved.

LECTURE XLVIII.

OF THE LAW OF MARINE INSURANCE.

1. What is marine insurance ?—252

It is a contract whereby one party, for a stipulated premium, undertakes to indemnify the other against certain perils, or sea risks, to which his

ship, freight, and cargo, or some of them, may be exposed, during a certain voyage, or a fixed period of time.

2. Who may be insured ?—252

All persons whether aliens or natives, except alien enemies.

3. Who may be insurers ?—255

Any individuals, or companies, or partnerships, may lawfully become insurers. In New York marine insurance, or lending on *respondentia* or *bottomry*, effected within the state, is prohibited to all persons and companies residing in any foreign country, acting by agent here. Persons and associations residing in other states effecting such insurances in New York, are taxed ten per cent on their premiums.

4. What, if in the terms of the contract, a ship be specified ?—257

It becomes a part of the contract, and no other ship can be substituted without necessity; but the cargo may be shifted from one ship to another, if done from necessity, and the insurer of it will be still liable.

5. What does an insurance on the body of a ship include ?—257

It sweeps in, by the comprehensiveness of the expression, whatever is appurtenant to the ship. This doctrine is taught by all the continental writers on insurance, as well as in the English law.

6. What if a partner insure in his own name only ?—258

It will cover his undivided interest in the partnership, and no more. If the policy has the words, *and whomsoever it may concern*, then it will cover the partnership interest.

7. To whom only will those general words, *whomsoever it may concern*, apply ?—258

To the person having an interest in the subject insured, and who was in the contemplation of the contract.

8. Will a policy on a voyage from abroad be good, if it omit to name the ship, or master, or port of discharge, or consignee ?—259

It may, for all these may be unknown to the insured when he applies for insurance.

9. What if a policy be part written and part printed, and there should arise a reasonable doubt, upon the meaning of the contract ?—260

The greater effect is to be attributed to the written words.

10. What if an agent effects a policy for his principal without his knowledge ?—260

If the principal afterwards adopts the acts, the insurer is bound; but if it be not adopted the contract is not binding.

11. Is a merchant who has effects of his foreign correspondent in his hands, or who has been in the habit of insuring for him, bound to comply with an order to insure?—261

He is, and the order may be implied in some cases, from the previous course of dealing between the parties.

12. What if the agent neglects, or imperfectly executes the order?—261

He is answerable as if he himself was the insurer, and is entitled to the premium.

13. What if the subject matter of the policy be assigned?—261

The policy may also be assigned, so as to give a right of action to the assignee.

14. What is the proper subject of insurance?—262

Lawful property engaged in lawful trade.

15. Is a policy on a voyage undertaken in violation of a blockade, or of an embargo, or of the provisions of a treaty, legal?—262

It is not, whether the policy be on the ship, freight or goods embarked in the illegal traffic.

16. Is the insurance of goods employed in a foreign smuggling or contraband trade, valid?—263

It is, if the insured was fully informed, when he entered into the contract, of the nature of the trade. But insurance to, does not include the risk of going into the port in violation of law, unless the peril of illicit entry at the port be also within the provision or contemplation of the policy.

17. Is the insurance by a neutral, of goods usually denominated contraband of war, valid?—266

It is, for it is not deemed unlawful for a neutral to be engaged in a contraband trade. Illicit voyages may be ranked in several classes:

1. When the sovereign of the country to which the ship belongs, interdicts trade with a foreign country or port; in which case, a voyage, for the purpose of trade, would be illegal, and all insurances thereon void.

2. Where the trade in question is prohibited by the trade laws of a foreign state; and in that case, the voyage, in such trade, may be the subject of insurance in any state in which the trade is not prohibited, for the municipal laws of one jurisdiction have no force in another.

3. When neutrals transport to belligerents goods contraband of war.

The law of nations does not go to the extent of rendering the neutral shipper of goods contraband of war an offender against his own sovereign. An insurance, then, by neutrals, in a neutral country, is valid, whether it relates to an interloping trade in a foreign port, illicit *lege loci*, or to a trade in transporting contraband goods, which is illicit *jure belli*.

18. From what reason, have the ordinances generally prohibited the insurance of seamen's wages?—269

From the consideration, that if the title to wages did not depend upon the earning of freight by the performance of the voyage, seamen would want one great stimulous to exertion in times of difficulty and disaster.

19. What is the doctrine as to insuring freight?—269

In France and Spain, freight not earned, cannot be insured, and for the same reason, that seamen's wages are not insureable; freight already earned may be insured. In England, and in the United States, future, or expected and contingent, and even dead freight, is held to be an insurable interest.

20. When does the risk generally begin?—270

From the time the goods, or a part of them, are put on board; and if the ship has been let to freight under a charter party of affreightment, the right to freight commences, and is at risk, so soon as the ship breaks ground; and if the charterer omits to put on board the expected cargo, and the ship performs the voyage in ballast, the right to freight is perfect.

21. Are profits a proper subject of insurance?—271

They are; the right to insure expected or contingent profits, is settled in England, and has received repeated and elaborate confirmation. They are likewise, in this country, held to be an insurable interest. In France the insurances on profits are unlawful.

22. What is an open policy?—272

It is one in which the amount of interest is not fixed, but is to be ascertained by the insured, in case a loss should happen.

23. What is a valued policy?—273

It is where the value has been set on the ship or goods iusured, and inserted in the policy, in the nature of liquidated damages.

24. What is the effect of an excessive, or fraudulent valuation?—273

A valuation, fraudulent in fact, as respects the insurer, or so excessive as to raise a necessary presumption of fraud, entirely vacates the policy.

25. Does the valuation apply to partial losses?—274

The better opinion is, that in settling all losses, total or partial, the valuation of the property in the policy, is to be considered as correct in the adjustment of the loss.

26. What if there be certain articles comprised in a valuation and part of them are safely landed before the ship is lost?—275

The valuation must be opened, and the claim of the insured reduced in the proportion which the articles actually lost bore to the valuation of the whole at the commencement of the risk.

27. What is a wager policy?—275

A policy on a mere hope or expectation, without any interest in the subject matter.

28. What is a sufficient interest?—275

If a person be directly liable to loss on the happening of any particular event, he has an insurable interest. A creditor, to whom property is assigned, as collateral security, has an insurable interest to the amount of his debt. Commissions to become due to public agents, and all reasonable expectations of profits, are insurable interests. Interest does not necessarily imply a right to, or property in, the subject insured.

29. What is a re-assurance?—278

It is where after an insurance has been made, the insurer hath the entire sum re-assured to him, by some other insurer. The first insurer may re-assure to the same amount; but the better opinion is that he cannot insure the premium due him for the first insurance. The insured may ikewise insure the solvency of the first insurer.

30. What is a double insurance?—280

It is where the insured makes two insurances on the same risk, and the same interest. But the law will not allow him to receive a double satisfaction, though he may sue on both the policies. The underwriters on both the policies are bound to contribute ratably towards the loss.

31. What is the rule for contribution in cases of double insurance?—281

It was declared by the Circuit Court of the United States at Philadelphia, *Thurston* v. *Koch*, that the insurers pay according to the rate of their subscriptions, without regard to the order of time in which the policies were made, and if the insured recovers his whole loss from one set of underwriters, they will be entitled to their action against the other insurers, on the same interest and risk, for a ratable proportion of the loss. The French rule is, that if there exist several contracts of insurance on the same interest and risk, and the first policy covers the whole value of the

subject, it bears the whole loss, and the subsequent insurers are discharged on returning all but one half per cent. premium. The ancient rule in England was according to the French ordinance.

32. What if two policies be dated on the same day ?—281

The policy first in point of fact, must bear the loss.

33. What is the usage of the companies in New York, in regard to partial losses ?—281

That they are to be apportioned between the policies, without regard to dates, provided the cargo on board was large enough to have attached both policies. This is the French rule.

34. What is a representation ?—282

It is a communication of the facts and objects which are to determine the will of the insurer.

35. What are the effects of a misrepresentation ?—282

It is an established principle, that a misrepresentation to the underwriter, or the concealment of a fact material to the risk, will avoid the policy. A representation to the first underwriter, in favour of the risk, extends to all subsequent underwriters. This rule is strictly confined to representations made to the first underwriter, and does not extend to intermediate ones. Nor does it extend to a subsequent underwriter on a different policy, though on the same vessel, and against the same risks.

36. What is meant by the warranty of seaworthy ?—287

That the vessel is competent to resist the ordinary attacks of wind and weather, and is competently equipped and manned for the voyage, with a sufficient crew, and with sufficient means to sustain them, and with a captain of general good character and nautical skill. This warranty of seaworthiness relates to the commencement of the risk, and the warranty is not broken if she becomes unseaworthy afterwards.

37. What is the effect of the breach of the implied warranty of seaworthiness in the course of the voyage ?—288

It has no retrospective operation, and does not destroy a just claim to damages for losses occurring prior to the breach of this implied condition.

38. How is every warranty considered ?—288

As a part of the contract, and is either express or implied. If it be an express warranty, it must appear on the face of the policy. It requires a strict and literal performance. Whether the thing warranted be material or not, and whether the loss happened by reason of a breach of the warranty, or did not, is immaterial. A breach of it avoids the contract *ab initio*.

39. What is the effect of a survey ?—289

If it be made within a reasonable time after the determination of the voyage, and if the survey states that the vessel was condemned solely on account of rottenness existing at the time of the survey, it is a conclusive bar to the assured.

40. What are the most usual express warranties ?--289

That the ship was safe at such a time, or would sail by such a day, or would sail with convoy, or a warranty against illicit trade, or that property insured is neutral.

41. What are the risks usually insured against ?—291

The general rule is, that the insurer charges himself with all the maritime perils that the thing insured can meet with on the voyage ; but the enumerated list may be enlarged or abridged at the pleasure of the parties.

42. May a person insure against a loss by reason of the acts of his own government, as an arrest, or embargo ?—291

He may, and there is no distinction on this point between a foreign and a domestic embargo ; if the embargo intervenes after the commencement of the risk, it suspends, but does not dissolve the contract of insurance, and the insured may abandon as for a total loss.

43. To what does a warranty against illicit trade apply ?—294

Only to seizures for breaches of the laws of trade, and the commercial regulations of ports. It does not extend to seizures for offences against the law of nations, nor to acts of lawless violence, though committed under a pretext of some municipal regulation ; nor to arbitrary seizures under the pretence of illicit trade, when in fact no such trade existed.

44. What is the established rule, if the loss of memorandum articles be partial ?—299

That the underwriter pays nothing ; and it is partial only, when part of the cargo arrives in safety, however deteriorated in value, though another part of the cargo had been wholly destroyed by disasters on the voyage.

45. What are the usual perils covered by the policy ?—299

All those natural perils and operations of the elements which occur without the intervention of human agency, and which the prudence of man could not foresee, nor his strength resist.

46. Is the destruction of the ship by worms within perils of the sea insured against ?—300

It is not; nor the loss of an anchor by the friction of rocks, nor the diminution of liquids by ordinary leakage, nor hemp taking fire in a state of effervescence, nor injury done to the ship by rats.

47. After what length of time, shall a missing vessel be presumed to have perished by the perils of the sea?—301

There is no precise time fixed by the English law. In the French law, a vessel not heard from is presumed to have been lost, after the expiration of one year, in ordinary voyages, and two in long ones. By the ordinance of Hamburg, a ship was presumed to be lost, if bound to any place in Europe, and not heard from in three months, and by the *Recopilacion des Loyes de Indias*, in Spain, if not heard from within a year and a half. In the case of missing vessels, the loss is presumed to have happened immediately after the date of the last news.

48. If a ship be driven ashore by the wind, and in that situation is captured by an enemy, to which is her loss attributed?—302

To the capture; for the peril, whatever it may be, upon which the policy attaches, must be the proximate, and not the remote cause of the loss.

49. What if a partial loss be followed by a total loss?—302

The former may be considered as merged in the latter.

50. Are the wages and provisions of the crew, during the necessary detention of the vessel for repairs, requisite in the course of the voyage, by reason of the perils insured against, considered as included in the perils of the sea?—302

By the rule and practice of these United States they are, and made chargeable upon the insurer.

51. What do the enumerated perils of pirates, rovers, and thieves, include?—303

The wrongful and violent acts of individuals, whether in the open character of felons, or the character of a mob, or a mutinous crew, or as plunderers of shipwrecked goods on shore.

52. To what does the stipulation of indemnity against all takings at sea, arrests, restraints, and detainments of all kings, princes, and people, refer?—303

Only to the acts of government for government purposes, whether right or wrong.

53. What is the effect of an arrest in the domestic port?—303

If made after the voyage is commenced it justifies an abandonment;

but if made before the risk commenced, the contract is discharged. An arrest by admiralty process, at the instance of an individual, on a private claim, is not a case within the policy.

54. How far is the insurer liable under the insurance against fire?—304

It is held, that if the ship be burnt under justifiable circumstances, to prevent capture, or from an apprehension of a contagious disease, the insurer is liable. If sails and rigging, put on shore while the vessel is repairing at a foreign port, be burnt, they are covered by the policy. It has likewise been held, after a learned discussion, that the insurer is answerable for a loss by fire occasioned by the negligence of the master and mariners.

55. What is barratry?—304

It means fraudulent conduct on the part of the master, in his character of master, or of the mariners, to the injury of the owner, and without his consent, and it includes every breach of trust committed with dishonest views. Barratry is used by the French writers in a larger sense, as comprehending negligence, as well as misconduct.

56. What time is included in a policy, *at and from?*—307

All the time the ship is in port after the policy is subscribed, if the ship be at home; and if abroad, it commences, according to a decision in Pennsylvania, only from the time she has been moored twenty-four hours in safety after her arrival. But if a ship be expected to arrive at a foreign port, and be insured *at and from that place*, or *from her arrival* there, other cases say, the risk attaches from her first arrival. The risk continues during quarantine, though after the twenty-four hours.

57. What if the policy be to a country generally, as to Jamaica?—308

The risk ends at the first port made for the purpose of unloading, after the vessel has been moored there twenty-four hours in safety. But in France, where insurances are generally made to the *French West India Islands*, the risk continues until the cargo is discharged at the last place of destination.

58. At what time does the risk begin in insurances on freight?—311

Usually from the time the goods are sent on board, and not before. But if the ship, sailing under contract, be lost on her way to the port of lading, or at the port of lading to which she had arrived in ballast, before any goods are put on board, or when part only of the cargo is on board, and preparation making to receive passengers, the insurer on freight and passage money is liable.

59. What is the effect of *deviation?*—312

If the vessel departs voluntarily, and without necessity, from the

usual course of the voyage, the insurer is discharged; not indeed from loss occurring previous to the deviation, but from all subsequent losses. Any stoppage on the high seas, except for the purpose of saving life, is a deviation, and will discharge the underwriter.

60. What if there be several ports of discharge mentioned in the policy, and the insured goes to more than one?—314

He must go to them in the order in which they are named in the policy, or if they be not specifically named, he must generally go to them in the geographical order in which they occur.

61. What if the ship quits from necessity, the course described in the policy?—315

She must pursue such new voyage of necessity, in the direct course, and in the shortest time, or it will amount to a deviation.

62. What if the vessel have liberty to carry letters of marque?—315

She may deviate for the purpose of defence, but not for the purpose of capture. In *Haven* v. *Holland*, (2 *Mason's Rep.*, 230,) a pretty enlarged discretion, for the purpose of capture, was confided to the captain, as to the best mode of defence, and it was held, that the letter of marque might chase and capture hostile vessels in sight, in the course of the voyage. If liberty be given her to *chase and capture*, that will not enable her to convoy her prize into port; and to cruise for six weeks, means six consecutive weeks, and not at different times.

63. What is a total loss within the meaning of the policy?—318

It may arise either by the total destruction of the thing insured, or, if it specifically remains, by such damage to it as renders it of little value. A loss is said to be total if the voyage be entirely lost or defeated, or not worth pursuing, and the projected adventure frustrated. It is a constructive total loss if the thing insured, though existing in fact, is lost for any beneficial purpose to the owner.

64. What is the effect of an abandonment?—319

It has a retrospective effect, and does of itself, and without any deed of cession, transfer the right of property to the insurer to the extent of the insurance.

65. Within what time, after information of the loss, must the abandonment be made, in order to charge the underwriter with a constructive total loss?—319

As soon as the insured is informed of the loss, he ought (after being allowed a reasonable time to inspect the cargo, and for no other purpose,) to determine promptly whether he will elect to abandon; and he cannot lie by to speculate on events.

"The reasonable time forgiving notice of abandonment depends upon circumstances, and five days delay after intelligence received has been held to late.—5 *Maule & Selw.* 47."

66. What kind, or extent of loss will constitute the right to abandon?—321

Any case of extreme hazard, and of probable expense, exceeding one half the value of the ship, though it should happen that she was afterwards recovered at a less expense. Such are the common cases of total losses by embargoes, by captures, and by restraints, and detainments of princes. The right to abandon exists when the ship, for all the useful purposes of the voyage, is gone from the control of the owner; as in the cases of submersion, or shipwreck, or capture.

The right of abandonment is to be judged of by all the circumstances of each particular case, and there is no general rule that the injury to the ship must in all cases exceed one half of her value, to justify an abandonment.—3 *Mason's Rep.* 27.

67. In what cases does the French ordinance of the marine, allow of an abandonment?—322

In cases of capture, shipwreck, stranding with partial wreck, disability of the vessel occasioned by perils of the sea, arrest by a foreign power, or arrest on the part of the government of the insured after the commencement of the voyage, and a loss or damage of the property insured, if amounting to at least three-fourths of its value.

68. What is shipwreck?—323

There are two kinds, 1. When the vessel sinks or is dashed to pieces. 2. When she is stranded, that is, when she is grounded and fills with water.

69. What is the general rule as to abandonment?—329

That if the ship be so injured by perils as to require repairs to the extent of more than one half of her value, the insured may abandon; for if ship or cargo be damaged, so as to diminish their value above one half, they are said to be lost.

70. What if a part only of the property insured is damaged above a moity, or lost?—329

If the insurance be upon different kinds of goods indiscriminately, or as one entire parcel, it is then an insurance upon an integral subject, and an abandonment of part only cannot be made. But if the articles be separately specified and valued, it has been considered so far in the nature of a distinct insurance on each parcel, that the insured was allowed to recover for a total loss of the damaged parcel. The meaning of the words in the rule, "one half of the value," has been held to be, the half of the

general market value of the vessel, at the time of the disaster, and not her value for any particular voyage, or purpose. It has been considered, that the three objects of insurance, vessel, cargo, and freight, stand on the same ground as to a total loss by deterioration to more than one half of the value.

71. What is the rule for ascertaining the value of the ship, and the *quantum* of expense or injury ?—330

The valuation in the policy is conclusive in case of a total loss, but in some respects, it is inapplicable for the purpose of ascertaining the *quantum* of injury, in case of a partial loss of goods. The rule in that case is, to ascertain the amount of injury by the difference between the gross proceeds of the sound and damaged goods.

72. What is the doctrine, as regards the freight of an abandoned ship ? —333

It has been a controverted question, whether an abandonment of the ship transferred the freight in whole or in part. It was finally settled in the jurisprudence of New York and of Massachusetts, and adopted as the true rule in the Circuit Court of the United States for Massachusetts, that on an accepted abandonment of the ship, the freight earned previous to the disaster was to be retained by the owner, or his representative, the insurer on the freight, and apportioned *pro rata itineris*. This litigious question has now been settled in England ; and in *Case* v. *Davidson*, (5 *Maule & Selw.* 79. *S. C.* affirmed on error, 2 *Brod. Bing.* 379. In this case the court did not make any distinction between the freight earned as a *pro rata* freight, antecedent to the abandonment, and that earned afterwards, but the entire freight was held to pass with the transfer of the ship. Where ship and freight were separately insured, and each subject abandoned as for a total loss, it was adjudged that the abandonment of the ship transferred the freight as incident, and that an abandonment was equivalent to a sale of the ship to the abandonee. The French new code of commerce declared that the freight of goods saved, though paid in advance went, upon abandonment, to the insurer on the ship. The construction given to the code by the Royal Court at Rennes, in 1822, in the case of *Blaize* v. *Company of General Assurance at Paris*, was, that the future freight did not go to the insurer on the ship, but only the freight on the goods saved and already earned at the time of the loss.

73. What is the rule for the adjustment of partial losses ?—334

In an open policy the general rule is, that the actual or market value of the subject insured, is to be estimated at the time of the commencement of the risk. In *Gahn* v. *Broome*, the invoice price was adopted as the most stable and certain evidence of the actual value ; but in *Le Roy* v. *The United Insurance Company*, the invoice price was understood to be equivalent to the prime cost, and that was commonly the market value of the subject at the commencement of the risk. The English Court of

King's Bench, in *Usher* v. *Noble* pursued in effect, the same rule, by estimating a loss on goods in an open policy, at the invoice price at the loading port, and taking with that the premium of insurance, and commission, as the basis of the calculation. If goods arrive damaged at the place of destination, the way to ascertain the quantity of the damage either in open or valued policies, is to compare the market price or gross amount of the damaged goods, with the market price or gross amount at which the same goods would have sold if sound.

74. What is the rule, as to return of premium ?—341

If the insurance be void *ab initio*, or the risk has not been commenced, the insured is entitled to a return of premium. If the insurance be made without any interest whatsoever in the thing insured, and this proceeds through mistake, or misinformation, or any other innocent cause, the premium is to be returned. If the risk has not been run, whether it be owing to the fault, or pleasure, or will of the insured or to any other cause, the premium must be returned. If the vessel never sailed on the voyage insured, or the policy became void by failure of the warranty, and without fraud, the policy never attached; but if the risk has once commenced, though the voyage be immediately thereafter abandoned, there is to be no return or apportionment of premium. And if the premium is returned, it is the usage in every country where it is not otherwise expressly stipulated in the policy, for the insurer to retain one half per cent. by way of indemnity for his trouble and concern in the transaction.

LECTURE XLIX.

OF MARITIME LOANS.

1. What are maritime loans called ?—352

Contracts of *bottomry* and *respondentia*.

2. What is a *bottomry bond ?*—354

It is a loan upon the ship and freight, and is in the nature of a mortgage, by which the ship-owner, or master on his behalf, pledges the ship as security for money borrowed; and it covers the whole freight of the voyage, from the port of departure to the port of destination.

3. What is a *respondentia bond ?*—354

It is a loan upon the pledge of the cargo, though an hypothecation of

both ship and cargo may be made in one instrument; and generally, it is only a personal obligation upon the borrower, and is not a specific lien upon the goods, unless there be an express stipulation to that effect in the bond, and it amounts at most, to an equitable lien on the salvage in case of loss. The condition of the loan is, the safe arrival of the subject hypothecated, and the entire principal, as well as interest, is at the risk of the lender during the voyage; and if the subject arrives safe or if it shall not have been injured, except by its own defect, or the fault of the master or mariners, the borrower must return the sum borrowed, together with the maritime interest agreed on, and for the repayment, the person of the borrower is bound, as well as the property pledged.

4. When can the master of a ship take up money on respondentia or bottomry ?—356

The general rule is, that this power exists only after the voyage has commenced, and is to be exercised in some foreign port where the owner does not reside. The master cannot hypothecate for a pre-existing debt, and the necessity of the loan must be shown to have existed at the time it was made. and that the master had no other means of raising the money at maritime interest; and when that fact is established, the misapplication of it by the master, without the knowledge and assent of the lender, will not effect its validity.

5. What if after money has been taken up on respondentia, and before the risk commenced, the voyage is broken up ?—357

The marine interest depends entirely upon the risk, and therefore, if the proposed voyage be abandoned before the risk has attached the contract is turned into a simple and absolute loan at ordinary and legal interest.

6. What if the borrower had not goods on board the ship to the value of the sum borrowed ?—357

The contract, in case of loss, is reduced in proportion to the diminished value, and the borrower is bound at all events to return the surplus of the sum borrowed with the ordinary interest. The maritime interest is in a ratio to the maritime risk, or value of the goods shipped.

7. Why is it, that a bond fairly given at a foreign port, under pressure of necessity, is entitled to priority of payment over one of a former date ? —358

The equity of it consists in this, that the last loan furnished the means of preserving the ship, and without it, the former lenders would entirely have lost their security, and therefore it supersedes a prior mortgage as well as any other prior lien.

8. May the lender upon respondentia or bottomry, insure the money lent ?—358

He can insure the principal, but not his maritime interest.

9. Will a constructive total loss discharge the borrower on bottomry? —359

It will not. Nothing but an utter annihilation of the subject hypothecated will discharge him.

10. What is the rule as to the liability of the lender on *bottomry* or *respondentia* to contribute in case of general average?—360

In England, except on India risks, the lender does not contribute. This is contrary to the maritime law of France and of other parts of Europe, and in Louisiana we have a decision against it. The new French law, contrary to the ordinance of 1681, charges the lender with simple average, on partial losses, unless there be a positive stipulation to the contrary; but such a stipulation to exempt him from gross or general average, would be void and contrary to natural equity.

11. What if the ship or cargo be lost, not by perils of the sea, but by default of the borrower or master?—360

The hypothecation bond is forfeited and must be paid.

12. What if the ship be lost on the voyage, and the cargo forwarded by another ship?—360

The borrowers in that case must pay the debt.

13. Is a loan on *bottomry* or *respondentia* good, if the ship or goods be already at sea when it is effected?—361

It has been held good by the Supreme Court of the United States.

14. When does the maritime interest cease?—362

After the risk has ceased by the safe arrival of the ship, marine interest ceases, and gives place to ordinary legal interest, on the aggregate amount of the debt due, consisting of the money lent with maritime premium.

15. Are seamen's wages a legal subject for bottomry or respondentia loans?—363

They are not.

16. What if a bottomry contract be made payable to order or bearer? —363

It is negotiable like a bill of exchange, and it is to be dealt with and protested in like manner.—*Boulay Paty*, 3. 97.

LECTURE L.

OF INSURANCE OF LIVES AND AGAINST FIRE.

1. What is the nature of the contract of insurance upon lives ?—365

These are liberal contracts, and while they create an advantageous investment of capital, they operate benevolently towards the public. Their usual purpose is to provide a fund for creditors, or for family connexions in case of death. The insurer, in consideration of a sum in gross, or of periodical payments, undertakes to pay a certain sum, or an annuity, depending upon the death of a person whose life is insured. The insurance is either for the whole term of life, or for a limited period. Such is the nature of these contracts, that they are well calculated to relieve the more helpless members of a family from a precarious dependence, resting upon the life of a single person ; and they very naturally engage the attention and influence the judgment of those thinking men, who have been accustomed to reflect deeply upon the past, and to form just anticipations of the future.

2. When did life insurance in England commence ?—367

With the Amicable Society, in the beginning of the last century ; and in 1827, there were in the United Kingdom, forty-four life insurance companies.

3. What is undertaken by the underwriter, on an insurance against fire ?—370

He undertakes, in consideration of the premium, to indemnify the insured against all losses in his houses, buildings, furniture, ships in port, or merchandise, by means of accidental fire happening within a prescribed period.

4. What is a sufficient interest in the property to support an insurance against fire ?—371

A creditor may have a policy on the house and goods of his debtor, upon which he has a lien or mortgage security. So, a trustee, or agent, or factor, who has the custody of goods for sale on commission, may insure them, and a *bona fide* equitable interest may be insured.

5. What is the insured bound in good faith to disclose to the insurer ? —373

Every fact material to the risk and within his knowledge, and which if stated, would influence the mind of the insurer in making or declining the contract.

6. What species of property are not deemed objects of insurance ?—373

Books of accounts, written securities, or evidence of debt, title deeds, writings, money, or bullion. Nor are jewels, plate, medals, paintings, statuary, sculptures, and curiosities included unless specified.

7. What is the rule as to the assignment of policies ?—375

Fire policies usually contain a prohibition against the assignment of them, without the previous consent of the company. But without this clause, they are assignable in equity like other choses in action, though to render the assignment of any value to the assignee, an interest in the subject matter of the insurance must be assigned also. This restriction upon assignments of the policy, applies only to transfers before a loss happens, and it applies only to voluntary sales, and not to sales on execution. If buildings insured be mortgaged, the policy is *ipso facto* assigned by the mortgage.

8. How are settlements of losses by fire made ?—375

They are made on the principle of particular average, and the estimated loss is paid without abandonment of what has been saved. Damages and reasonable charges on removing at a fire, articles insured, are covered by the policy.

9. How are losses certified ?—376

Upon oath, and the certificate of a magistrate, notary, or clergyman, is made necessary to be procured in favour of the truth and fairness of the statement of the loss, and a strict and literal compliance with the terms of the conditions is held indispensable to the right of recovery.

LECTURE LI.

OF THE FOUNDATION OF TITLE TO LANDS.

1. Upon the introduction of the feudal tenures, what became a fundamental maxim of the English law in relation to title to land ?—378

That the king was the original proprietor of all the land in the kingdom, and the only true source of title. In this country we have adopted the same principle, and applied it to our own republican governments: and it is a settled fundamental doctrine with us, that all valid individual title to

land within the United States, is derived from the grant of our local governments, or from the United States, or from the crown or royal chartered governments, established here prior to the revolution. This doctrine was declared in New York, in the case of *Jackson* v. *Ingraham*, and it was held to be the settled rule, that the courts could not take notice of any title not derived from our own state or colonial government, and duly verified by patent.

2. By what right did the European nations claim to have dominion on this continent?—378

By right of prior discovery, which discovery was considered to have given to the government by whose subjects or authority it was made, a title to the country, and the sole right of acquiring the soil from the natives, as against all other European powers. Each nation claimed the right to regulate for itself, in exclusion of all others, the relation which was to subsist between the discoverer and the Indians. That relation necessarily impaired, to a considerable degree, the rights of the original inhabitants, and an ascendency was asserted in consequence of the superior genius of the Europeans, founded on civilization and christianity, and of their superiority in the art of war. The European nations which respectively established colonies in America, assumed the ultimate dominion to be in themselves, and claimed the exclusive right to grant a title to the soil, subject only to the Indian right of occupancy. The natives were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion, though not to dispose of the soil at their will, except to the government claiming the right of pre-emption. The practice of Spain, France, Holland, and England proved the very general recognition of the claim and title to American territories given by discovery. The United States have adopted the same principle, and their exclusive right to extinguish the Indian title by purchase or conquest, and to grant the soil, and exercise such a degree of sovereignty as circumstances required, has never been judicially questioned.

LECTURE LII.

OF INCORPORAL HEREDITAMENTS.

1. What are corporal hereditaments?—401

They are confined to land, which according to Lord Coke, includes not only the ground or soil, but every thing which is attached to the earth,

whether by the course of nature, as trees, herbage, and water, or by the hand of man, as houses, and other buildings; and which has an indefinite extent upwards as well as downwards, so as to include every thing terrestrial under or over it.

2. What are incorporeal hereditaments?—402

Certain inheritable rights, which are not, strictly speaking of a corporeal nature or land, although they are by their own nature, or by use, annexed to corporeal inheritances, and are rights issuing out of them, or concern them. They pass by deed, without livery, because they are not tangible rights.

3. What are the principal incorporeal rights which subsist in our law?—403

1. Commons. 2. Ways, easements, and aquatic rights. 3. Offices. 4. Franchises. 5. Annuities. 6. Rents.

4. What is a right of common?—403

It is a right which one man has in the lands of another. The object of which is to pasture his cattle, or provide necessary fuel for his family, or for repairing his necessary implements of husbandry. Common of pasture is known as common of pasture *appendant*, and common of pasture *appurtenant*. Common *appendant* is founded on prescription, and is regularly annexed to arable land. It authorized the owner or occupier of the arable land to put commonable beasts upon the waste grounds of the manor. Common *appurtenant* may be annexed to any kind of land, and may be created by grant as well as prescription. It allowed the owner to put in other beasts than such as plough or manure the land. Common of *estrovers* may be equally appendant or appurtenant.

5. What is a right of way?—419

It is a right of private passage over another man's ground, and may arise either by grant or prescription. It may arise from necessity in several respects. Thus, if a man sells land to another which is wholly surrounded by his own land, in this case the purchaser is entitled to a right of way over the other's ground to arrive at his land. This principle was carried so far in a modern case, (8 *Term Rep.* 50,) as to be applied to a trustee selling land he held in trust, and to which there was no access but over the trustee's own land.

6. What is the law as to riparian rights?—427

It is a settled principle of the English law, that the right of the soil of owners of land bounded by the sea, or on navigable rivers, where the tide ebbs and flows, extends to high-water mark; and the shore below the common high-water mark, belongs to the public; and in England the crown, and in this country the people, have the absolute proprietary interest in the same, though it may, by grant or prescription, become private

property. But grants of land, bounded on rivers, or upon the margins of the same, above tide water, carry the exclusive right and title of the grantee to the centre of the stream; and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage as a public highway.

7. What is the law in respect to public highways?—432

It is the same as that of fresh-water rivers, and the analogy is perfect, as concerns the right of soil. The presumption is that the owners of the land on each side go to the centre of the road, and they have the exclusive right to the soil, subject to the right of passage in the public. Being owners of the soil, they have a right to all ordinary remedies for the freehold.

8. What are servitudes?—434

Real rights existing in the property of another. Like incorporeal hereditaments, they have been held not to pass without grant. By virtue of such a right, the proprietor of the estates charged is bound to permit, or not to do, certain acts in relation to his estate, for the utility or accommodation of a third person, or of the possession of an adjoining estate.

9. What is the rule in respect to running waters?—439

That no proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere*, is the language of the law.

10. How may easements be lost?—447

A right acquired by use may be lost by non-user, and an absolute discontinuance of the use affords a presumption of the extinguishment of the right in favour of some other adverse right. As an enjoyment for twenty years is necessary to found a presumption of a grant, the general rule is, that there must be a similar non-user to raise the presumption of a release.

11. What is the distinction between an easement and a license?—452

A claim for an easement must be founded upon grant by deed or writing, or upon prescription which supposes one; for it is a permanent interest in another's land, with a right at all times to enter and enjoy it. But a license is an authority to do a particular act, or series of acts, upon another's land, without possessing any estate therein. It is founded on personal confidence, and is not assignable.

12. What are annuities?—460

An annuity, says Lord Coke, is a yearly sum stipulated to be paid to

another, in fee, or for life, or for years, and chargeable only on the person of the grantor. If it be agreed to be paid to the annuitant and his heirs, it is a personal fee, and transmissible by descent, like a personal fee. It is chargeable upon the person of the grantor, for if the annuity was made chargeable upon land, it would be a rent-charge.

13. What are rents?—460

Rent is a certain profit in money, provisions, chattels, or labor, issuing out of lands and tenements, in retribution for the use, and it cannot issue out of a mere privilege or easement. There were, at common law, according to Littleton, three kinds of rent, viz. rent-service, rent-charge, and rent-seck.

14. What was rent-service?—461

Where the tenant held his land by fealty, or other corporeal service, and a certain rent. A right of distress was inseperably incident to this rent.

15. What is a rent-charge, or fee-farm rent?—461

Where the rent is created by deed, and the fee granted; and as there is no fealty annexed to such a grant of the whole estate, the right of distress is not an incident, and it requires an express power of distress to be annexed to the grant, which gives it the name of a rent-charge.

16. What was rent-*seck*, *siccus*, or barren rent?—461

It was rent reserved by deed without any clause of distress, and in a case in which the owner of the rent had no future interest or reversion in the land.

17. What is the rule as to whom rent must be reserved?—463

That it must be reserved to him from whom the land proceeded, or his lawful representatives, and it cannot be reserved to a stranger.

18. What will discharge the tenant from paying the rent?—464

If the tenant be evicted by title paramount before the rent falls due, he will be discharged from the payment. But if the lawful eviction by paramount title, be of part only of the devised premises, the rent is apportionable, and the eviction a bar *pro tanto*. So, if there be an actual expulsion of the tenant from the whole or part, by the lessor before the rent becomes due, the entire rent is suspended.

19. What is the rule in cases where the premises are destroyed, as by fire?—466

That upon an express contract to pay rent, the loss of the premises by fire or inundation, or external violence, will not exempt the party from paying the rent.

20. What is the remedy for the non-payment of rent?—476

When the rent is due and unpaid, and when no judgment in a personal action has been had for the recovery of the same, the landlord, upon demand, may enter immediately, by himself or his agent, upon the demised premises, and distrain any goods and chattels that are to be found there, belonging to the tenant or others.

21. In what cases are articles not distrainable?—477

Articles temporarily placed upon land, by way of trade, and belonging to third persons; a horse at a public inn, or sent to a livery stable to be taken care of, or corn at a mill, or cloth at a tailor shop, or a grazier's cattle put upon the land for the night, on the way to market, or goods deposited in a warehouse for sale or on storage, in the way of trade, or goods of a principal in the hands of a factor are not distrainable for rent. Nor can beasts of the plough, sheep, or implements of a man's trade be taken for rent, so long as other property can be found.

LECTURE LIII.

OF THE HISTORY OF FEUDAL TENURE.

1. To what source do we trace the origin of the feudal system?—491

To the Gothic or northern nations. Some authors have supposed that the sources of feuds were not confined to those nations. And Neibuhr, in his History of Rome, vol. I. 99, declares the relation of patron and client to have been the feudal system in its noblest form. The better and prevailing opinion, however, is, that the origin of the feudal system is essentially to be attributed to the northern Gothic conquerors of the Roman Empire. It was part of their military policy, and devised by them as the most effectual means to secure their conquests. The chieftain, as head or representative of his nation, allotted portions of the conquered lands, in parcels, to his principal followers, and they, in their turn, gave smaller parcels to their subtenants or vassals, and all were granted on the same conditions of fealty and military service. The rudiments of the feudal law have been supposed, by many modern feudists, to have existed in the usages of the ancient Germans, as they were studied and described by Cæsar and Tacitus. The traces of the feudal policy were first distinctly perceived among the Franks, Burgundians, and Lombards, after they had invaded the Roman provinces. They generally permitted the Roman institutions to remain in the cities and towns, but they claimed a proportion

of the land and slaves of the provincials, and brought their own laws and usages with them. The conquered lands which were appropriated by military chiefs to their faithful followers, had the condition of future military service annexed, and this was the origin of *fiefs* and *feudal* tenures. The same class of persons who had been characterized as volunteers or companions in Germany, became loyal vassals under the feudal grants. These grants which were at first called benefices, were, in their origin, for life, or perhaps only for a term of years. The vassal had a right to use the land, and take the profits, and was bound to render in return such feudal duties and services as belonaed to military tenure. The property of the soil remained in the lord from whom the grant was received. The king or lord had the *dominium rectum*, and the vassal or feudatory the *dominium utile*. Prior to the introduction of the feudal system, lands were allodial, and held in free and absolute ownership in like manner as personal property was held. Allodial land was not suddenly but very gradually supplanted by the law of tenures. They were never so entirely introduced as to abolish all vestiges of allodial estates. The precise time when benefices became hereditary is uncertain. They began to be hereditary in the age of Charlemagne, who facilitated the conversion of allodial into feudal estates. The perpetuity of fiefs was established earlier in France than in Germany; but throughout the continent it appears they had become hereditary, and accompanied with the right of primogeniture, and all the other incidents peculiar to feudal governments, long before the era of the Norman conquest. England was distinguished above every part of Europe for the universal establishment of feudal tenures. There is no presumption or admission in the English law of allodial lands. They are all held by some feudal tenure. There were traces of feudal grants, and of the relation of lord and vassal in the time of the Anglo-Saxons, but the formal and regular establishment of feudal tenures in their genuine character, and with all their fruits and services, was in the reign of William the Conqueror. The tenures which were authoritively established in England in the time of the Conqueror were principally of two kinds, according to the services annexed. They were either tenures by *knight service*, in which the services, though occasionally uncertain, were altogether of a military nature; or tenures by *socage*, in which the services were defined and certain, and generally of a predial or pacific nature.

The only feudal fictions and services which can be presumed to exist in these United States, consist of the feudal principle, that the lands are held of some superior lord, to whom the obligation of fealty, and to pay a determinate rent, are due.

2. What is understood by the word *fealty* "*fidelitatis?*"—510

An oath of fidelity to the lord, and, to use the words of Littleton, when a freeholder doth fealty to his lord, he shall lay his right hand upon a book, and shall say, "Know ye this, my lord, that I shall be faithful and true unto you, and faith to you shall bear, for the lands which I claim to hold of you, and that I shall lawfully do to you the customs and services which I ought to do, at the terms assigned: so help me God and his Saints."

This oath of fealty every where followed the progress of the feudal system, and created all those interesting ties and obligations between the lord and his vassal, which, in the simplicity of the feudal ages, they considered to be their truest and greatest glory. It was the parent of the oath of allegiance which is exacted by sovereigns in modern times.

Lands held by socage tenure (and all lands granted before the revolution are so held) would seem, in theory, to have been chargeable with this oath of fealty.

Sir Mathew Hale says that the oath of fealty may be due to an inferior lord, and then the oath must have the saving, *salva fide et ligentia domini regis*. It may be exacted in England by landlords, and lords of manors, from tenants other than tenants at will, or from year to year.

END OF VOLUME THIRD.

VOLUME IV.

OF THE LAW CONCERNING REAL PROPERTY.

LECTURE XLIV.

OF ESTATES IN FEE.

The perusal of the former volumes has prepared the student to enter upon the doctrine of real estates, which is by far the most artificial and complex branch of our municipal law.

In treating of the doctrine of real estates, it will be most convenient, as well as most intelligible, to employ the established technical language to which we are accustomed, and which appertains to the science. Though the law in some of the United States, discriminates between an estate in pure *allodium*, and an estate in fee simple absolute, these estates mean essentially the same thing; and the terms may be used indiscriminately to describe the most ample and perfect interest which can be owned in land.—2

1. Has not the words *seisin* and *fee*, been always used in New York? —2

They have, whether the subject was lands granted before or since the revolution; though by the act of 1787, the former were declared to be held by the tenure of free and common socage, and the latter in free and pure allodium, but this was an unnecessary distinction in legal phraseology as applied to estates; and the distinction lay dormant in the statute, and was utterly lost and unfounded in practice. The technical language of the common law, is too deeply rooted in our usages and institutions, to be materially affected by legislative enactments.

In Connecticut and Virginia, the terms seisin and fee, are also applied to all estates of inheritance, though the lands in those states are declared to be allodial, and free from every vestige of feudal tenure.

2. What have the New York revised statutes declared on this subject? —3

That all lands within the state are allodial, and the entire and absolute property vested in the owners, according to their respective estates. All feudal tenures of every description, with their incidents are abolished, subject, nevertheless, to the liability to escheat, and to any rents or services certain, which had been, or might be, created or reserved; and to

avoid the inconvenience and absurdity of attempting a change in the technical language of the law, it was further declared, that every estate of inheritance, notwithstanding the abolition of tenure, should continue to be called a fee simple, or fee ; and that every such estate, when not defeasible or conditional, should be termed a fee simple absolute, or an absolute fee.

3. What is the proper meaning of a "fee," as now used in this country ?—4

An estate of inheritance in law, belonging to the owner, and transmissible to his heirs. No estate is deemed a fee, unless it may continue forever.

4. What is an estate called, whose duration is circumscribed by one or more lives in being ?—4

A freehold. Though the limitation be to a man and his heirs, during the life or widowhood of B., it is not an inheritance or fee, because the event must necessarily take place within the period of a life. It is merely a freehold with a descendible or transmissible quality ; and the heir takes the land as a descendible freehold.

5. Which is the most simple division of estates as laid down in the books ?—4

That mentioned by Sir William Blackstone, into inheritances absolute or fee *simple*, and inheritances *limited;* and these limited fees he subdivides into *qualified* and *conditional* fees. This was according to Lord Coke's division.

6. How has Mr. Preston, in his treatise on estate, divided fees ?—4

Into fees simple, fees determinable, fees qualified, fees conditional, and fees tail.

7. What is a fee simple ?—5

It is a pure inheritance, clear of any qualification or condition, and it gives a right of succession to all the heirs generally, under the restriction that they must be of the blood of the first purchaser, and of the blood of the person last seized. It is an estate of perpetuity, and confers an unlimited power of alienation, and no person is capable of having a greater interest in land.

8. Is, or is not the word heirs at common law, necessary to be used, if the estate is to be created by deed ?—4

It is.

9. If a man purchase lands to himself for ever, or to him and his assigns for ever, what will he take ?—5, 6

He takes but an estate for life.

10. But if the intent of the parties was clearly expressed in the deed, would not a fee then pass?—6

It would not, without the word heirs. The rule was founded originally on principles of feudal policy, which no longer exist, and it has now become entirely technical. A feudal grant was, *stricti juris*, made in consideration of the personal abilities of the feudatory, and his competency to render military service; and it was consequently confined to the life of the donee, unless there was an express provision that it should go to his heirs.

11. Has not the rule for a long time been controlled by a more liberal policy?—6

It has, and it is counteracted in practice by other rules equally artificial in their nature, and technical in their application.

12. Does it apply to coveyances by fine?—6

It does not, where the fine is in the nature of an action.

13. Does the rule apply to a common recovery?—6

It does not.

14. Does it apply to a release by way of extinguishment, as of a common of pasture?—6

It does not; nor to a partition between joint-tenants, coparceners, and tenants in common; nor to releases of right to land by way of discharge or passing the right, by one joint-tenant or coparcener to another.

15. What does the released take, in taking a distinct interest in his separate part of the land?—6

He takes the like estate in quantity, which he had before in common.

16. How do grants to corporations aggregate pass the fee?—7

Grants to corporations pass the fee without the words heirs or successors, because in judgment of law a corporation never dies, and is immortal by means of perpetual succession.

17. Will a fee pass by will without the word heirs?—7

It will, if the intention to pass a fee can be clearly ascertained from the will, or a fee be necessary to sustain the charge or trust created by the will. It is likewise understood, that a court of equity will supply the omission of words of inheritance; and in contracts to convey, it will sustain the right of the party to call for a conveyance in fee, when it appears to have been the intention of the contract to convey a fee.

18. But has not the statute law of some of the states abolished the inflexible rule of the common law?—7

It has.

19. What is a qualified, base, or determinable fee?—9

It is an interest which may continue for ever, but the estate is liable to be determined by some act or event, circumscribing its continuance or extent. Though the object on which it rests for perpetuity may be perishable or transitory, yet such estates are deemed fees, because, it is said, they have a possibility of enduring for ever. A limitation to a man and his heirs, so long as A. shall have heirs of his body; or to a man and his heirs, tenants of the manor of Dale; or till the marriage of B.; or so long as St. Paul's church shall stand, or a tree shall stand, are a few of the many instances given in the books, in which the estate will descend to the heirs, but continue no longer than the period mentioned in the respective limitations or when the qualification annexed to it is at an end.

20. What if the event marked out as the boundary to the time of the continuance of the estate, becomes impossible?—9

The estate then ceases to be determinable, and changes into a simple and absolute fee; but until that time, the estate is in the grantee, subject only to a possibility of reverter in the grantor.

21. What renders the estate a fee, and not merely a freehold?—9

The uncertainty of the event, and the possibility that the fee may last for ever

22. What are determinable fees, and how long do they continue descendible inheritances?—9

All fees liable to be defeated by an executory devise, are determinable fees, and they continue descendible inheritances until they are discharged from the determinable quality annexed to them, either by the happening of the event, or by a release.

23. What are these qualified and determinable fees termed?—9

They are likewise termed base fees, because their duration depends upon the occurrence of collateral circumstances, which qualify and debase the purity of the title.

24. May a tenant in tail, by a bargain and sale, lease and release, or covenant to stand seized, create a base fee, which will not determine until the issue in tail enters?—9

Yes, he may.

25. If the owner of a determinable fee conveys in fee, what follows the transfer, and on what is this founded?—10

The determinable quality of the estate follows the transfer; and this is founded upon the sound maxim of the common law, that *nemo potest plus juris in alium transfere quam ipse habet.*

26. What rights and privileges over the estate has the proprietor of a qualified fee?—10

The same as if he were a tenant in fee simple.

27. What is a conditional fee?—10

It is one which restrains the fee to some particular heirs exclusive of others, as to the heirs of a man's body, or to the heirs male of his body.

28. How was this fee construed at common law?—10

It was construed to be a fee simple, on condition that the grantee had the heirs prescribed.

29. What if the grantee died without issue?—10

Then the lands reverted to the grantor.

30. What if he had the specified issue?—11

The condition was supposed to be performed, and the estate became absolute, so far as to enable the grantee to alien the land, and bar not only his own issue, but the possibility of a reverter.

31. Could the tenant of the fee simple conditional by feoffment have bound the issue of his body before issue had?—11

He could.

32. After issue born, could the tenant bar the donor and his heirs of their possibility of a reversion?—11

Yes, but the course of descent was not altered thereby.

33. How was it before the statute *de donis?*—11

Before the enactment of the statute so called, a fee on condition that the donee had issue of his body, was, in fact a fee tail and the limitation was not effaced by the birth of issue.

34. What effect had the statute *de donis*, on the birth of issue, and how was it considered by the courts of justice?—12

It took away the power of alienation on the birth of issue, and the courts of justice considered that the estate was divided into a particular estate in the donee, and a reversion in the donor.

35. When the donee had a fee simple before, what had he by the statute?—12

An estate tail.

36. Under this division of the estate, could or would not the donee bar or charge his issue ?—12

He could not.

37. Were estates tail liable to forfeiture, for treason or felony ?—13

No. Nor were they chargeable with the debts of the ancestor, nor bound by alienation.

38. To whom were they beneficial, and to whom injurious ?—13

They were very conducive to the security and power of the great landed proprietors and their families, but very injurious to the industry and commerce of the nation.

39. When was relief first obtained against this great national grievance ?—13

It was not until Taltarum's case, 12 Edw. IV. that relief was obtained, and it was given by a bold and unexampled stretch of thepower of judicial legislation.

40. What then, did the judges resolve upon ?—13

Upon consultation, they resolved, that an estate tail might be cut off and barred, by a common recovery, and that by reason of the intended recompense, the common recovery was not within the restraint of the statute *de donis*.

41. Were these recoveries afterwards taken notice of ?—13

They were, and indirectly sanctioned, by several acts of Parliament, and have, ever since their application to estates tail, been held as one of the lawful and established assurances of the realm.

42. How are they now considered ?—13

They are now considered merely in the light of a conveyance on record, invented to give a tenant in tail, an absolute power to dispose of his estate, as if he were a tenant in fee simple ; and estates tail in England, for a long time past, have been reduced to almost the same state, even before issue born, as conditional fees were at common law, after the condition was performed by the birth of issue.

43. What does a common recovery remove ?—13

It removes all limitations upon an estate tail, and an absolute, unfettered, pure fee-simple, passes as the legal effect and operation of a common recovery.

44. Is it, or is it not, the only mode of conveyance in England, by which a tenant in tail, can effectually dock the entail?—14

It is.

45. If he conveys by deed, what only does he convey?—14

A base or avoidable fee, and he will not exclude his heirs *per formam doni.*

46. What only does he bar even by fine?—14

His issue only, and not subsequent remainders.

47. What alone is it, that passes an absolute title?—14

The common recovery.

48. Did not estates tail subsist in full force before our revolution?—14

They did.

49. Has not the doctrine of estates tail, and the complex and multifarious learning connected with it, become quite obsolete in most parts of the United States?—14

Yes it has,—in Virginia, estates tail were abolished as early as 1776; in New Jersey, in the years 1784 and 1786; and in New York, as early as 1782, and all estates tail were turned into estates in fee-simple absolute. So, in North Carolina, Kentucky, Tennessee, Georgia, and Missouri, estates tail have been abolished, by being converted by statute into estates in fee simple. In the states of Vermont, Indiana, Illinois, South Carolina, and Louisiana, they do not appear to be known to their laws, or even to have existed; but in several of the other states, they are partially tolerated, and exist in a qualified degree.

50. What has been the fate of conditional fees at common law?—16

They have generally partaken of the fate of estates in fee tail, and have not been revived in this country.

51. Does, or does not the general policy of this country, encourage restraints upon the power of alienation of land?—17

No. It does not.

52. Have the New York revised statutes enlarged or abridged the prevaling extent of executory limitations?—17

They have considerably abridged them.

53. Have not entails, under certain modifications, been retained in various parts of the United States?—19

They have, with increased power over the property, and greater fa-

cility of alienation. The desire to preserve and perpetuate family influence, and property, is very prevalent with mankind, and is deeply seated in the affections.

This propensity is attended with many beneficial effects. But if the doctrine of entails be calculated to stimulat eexertion and economy, by the hope of placing the fruits of talent and industry in the possession of a long line of lineal descendants, undisturbed by their folly or extravagance, it has a tendency on the other hand, to destroy the excitement to action in the issue in tail, and to leave an accumulated mass of property in the hands of the idle and vicious.

Dr. Smith insisted, from actual observation, that entailments were unfavorable to agricultural improvement. The practice of perpetual entails is carried to a great extent in Scotland, and that eminent philosopher observed, half a century ago, that one-third of the whole land of the country was loaded with the fetters of a strict entail; and it is understood that additions are every day making to the quantity of land in tail, and that they now extend over half the country. Some of the most distinguished of the Scotch statesmen and lawyers have united in condemning the policy of perpetual entails, as removing a very powerful incentive to preserving industry and honest ambition.

54. What says Mr. Gibbon on the simplicity of the civil law?—19

It is said by him, to have been a stranger to the long and intricate system of entails; and yet the Roman trust settlements, or *fidei commissa*, were analogous to estates tail. When an estate was left to an heir in trust, to leave it at his death to his eldest son, and so on by way of substitution, the person substituted corresponded in a degree to the English issue in tail.

55. What is it also termed by Mr. Gibbon?—20

A partial, perplexed, declamatory law, which, by an abuse of the novel, (159. c. 2. Justinian,) stretched the *fidei commissa* to the fourth degree.

56. How far were entails formerly permitted to extend in France?—20

To the period of three lives only; but in process of time, they gained ground, and trust settlements, says the ordinance of 1747, were extended not only to many persons successively, but to a long series of generations. That new kind of succession or entailment was founded on private will, which had usurped the place of law, and established a new kind of jurisprudence. It led to numerous and subtle questions, which perplexed the tribunals, and the circulation of property was embarassed. Chancellor D'Aguesseau prepared the ordinance of 1747, which was drawn with great wisdom, after consultation with the principal magistrates of the provincial parliaments, and the superior counsels of the realm, and receiving the exact reports of the state of the local jurisprudence on the subject. It limited the entail to two degrees, counted *per capita*, between

the maker of the entail and the heir; and, therefore, if the testator made A. his devisee for life, and after the death of A. to B., and after his death to C., and after his death to D., &c., and the estate should descend from A. to B., and from B. to C., he would hold it absolutely, and the remainder over to D. would be void. But the code Napoleon annihilated the mitigated entailments allowed by the ordinance of 1747, and declared all substitutions or entails to be null and void, even in respect to the first donee.

LECTURE LV.

OF ESTATES FOR LIFE.

1. Does an estate of freehold apply equally to an estate of inheritance; and to what does Sir William Blackstone confine freehold estate?—23

It does apply in both cases, and Sir William Blackstone confines the description of a freehold estate simply to the incident of livery of seisin, which applies to estates of inheritance and estates for life; and as those estates were the only ones which could not be conveyed at common law without the solemnity of livery of seisin, no other estates were properly freehold estates.

2. What may justly be denominated a freehold?—24

Any estate of inheritance, or for life, in real property, whether it be a corporeal or incorporeal hereditament, is justly entitled to that appellation.

3. What, by the ancient law, did a freehold interest confer upon the owner?—24

A variety of valuable rights and privileges. He became a suitor of the courts, and a judge in the capacity of a juror; he was entitled to vote for members of parliament, and to defend his title to the land; as owner of the immediate freehold, he was a necessary tenant to the *præcipe* in a real action, and he had a right to call in the aid of the reversioner or remainder-man, when the inheritance was demanded. These rights give him importance and dignity as a freeholder and freeman.

4. How were estates for life divided?—24

Into conventional and legal estates. The first are created by the act of parties, and the second by the operation of law.

5. What were estates for life, at common law?—24

Freehold estates of a feudal nature, inasmuch as they were conferred by the same forms and solemnity as estates in fee, and were held by fealty, services agreed on between the lord and tenant.

6. In what two ways may life estates be created?—25

1. By express words, as if A. conveys land to B. for the term of his natural life. 2. They may arise by construction of law, as if A. conveys land to B. without specifying the time of duration, and without words of limitation. In this last case, B. cannot have an estate in fee, according to the English law, and according to the law of those parts of the United States which have not altered the common law in this particular, but he will take the largest estate which can possibly arise from the grant, and that is an estate for life.

7. Of what two kinds are life estates?—25

Either for a man's own life, or for the life of another person, and in this last case, it is termed an estate *per autre vie*, which is the lowest species of freehold, and esteemed of less value than an estate for one's own life.

8. How has the law in this respect proceeded?—25

It has proceeded upon the known principles of human nature, for, in the ordinary opinion of mankind, as well as in the language of Lord Coke, "an estate for a man's own life is higher than for another man's life."

9. What third branch of life estate may also be added?—25

An estate for the term of the tenant's own life, and the life of one or more third persons. In this case, the tenant for life has but one freehold limited to his own life, and the life of the other party or parties.

10. May not these estates be made to depend upon a contingency, which can happen and determine the estate before the death of the grantee?—25

Yes. Thus if an estate be given to a woman *dum sola*, or *durante viduitate*, or to a person so long as he shall dwell in a particular place, or for any other indeterminate period, as a grant of an estate to a man until he shall have received a given sum out of the rents and profits; in all these cases, the grantee takes an estate for life, but one that is determinable upon the happening of the event on which the contingency depended. If the tenant for the life of B. died in the lifetime of B., the estate was open to any general occupant during the life of B.; but if the grant was to A. and his heirs during the life of B., the heir took it as a special occupant.

11. How in New York is an estate *per auter vie* deemed, whether limited to heirs or otherwise?—26

It is deemed a freehold only during the life of the grantee or devisee, and after his death it is deemed a chattel real.

12. What is tenancy by the curtesy?—26

It is an estate for life, created by the act of the law. When a man marries a woman, seised, at any time during the coverture, of an estate of inheritance, in severalty, in coparcenary, or in common, and hath issue born alive, and which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life, by the curtesy of England; and it is immaterial whether the issue be living at the time of the seisin, or at the death of the wife, or whether it was born before or after the seisin.

13. How in South Carolina is tenancy by curtesy, *eo nomine?*—28

It has ceased by the provision of an act in 1794, *relative to the distribution of intestates' estates*, which gives to the husband surviving his wife the same share of her real estate as she would have taken out of his, if left a widow, and that is either one moiety or one-third of it, in fee, according to circumstances.

14. How in Georgia?—29

In Georgia it does not exist; because all marriages since 1785, vest the real equally with the personal estate in the husband.

15. What four things are requisite to an estate by the curtesy?—29

1. Marriage.
2. Actual seisin of the wife.
3. Issue.
4. Death of the wife.

16. Does the law vest the estate in the husband on the death of the wife, without entry?—29

It does.

17. When is his estate initiate and when consummate?—29

His estate is initiate on issue had, and consummate on the death of the wife.

18. How must the wife, according to the English law, have been seised to entitle the husband to his curtesy?—29

In fact and in deed, and not merely of a seisin in law of an estate of inheritance.

19. What is the law of curtesy in Connecticut?—30

The law of curtesy in that state, is made to symmetrize with other parts of their system, and ownership without seisin, is sufficient to govern the descent or devise of real estate.

20. Could the husband at common law be tenant by the curtsey of a use, and how is that point now settled in equity?—30

He could not, but it is now settled in equity, that he may be tenant by the curtesy of an equity of redemption, and of lands of which the wife had only a seisin in equity as a *cestui que trust*.

21. Is the receipt of the rents and profits a sufficient seisin in the wife?—31

It is.

22. What if lands be devised to the wife for her separate and exclusive use, and with a clear and distinct expression that the husband was not to have any life estate or other interest, but the same was to be for the wife and her heirs?—31

In that case, the court of chancery will consider the husband a trustee for the wife and her heirs, and bar him of his curtesy.

23. Is the husband of a mortgagee in fee entitled to his curtesy?—31

No.

24. What has this rule now become?—32

It has now become common learning, and it is well understood that the rights existing in, or flowing from the mortgagee, are subject to the claims of the equity of redemption, so long as the same remains in force.

25. To what estates does curtesy apply?—31

To qualified as well as to absolute estates in fee.

26. What is dower, and when or where does it exist?—34

It is a species of life estate created by the act of the law, and it exists where a man is siesed of an estate of inheritance, and dies in the lifetime of his wife.

27. Of what, in such a case, is she at common law, entitled to be endowed?—34

Of the third part of all the lands whereof her husband was seised, either in deed or in law, at any time during the coverture, and of which any issue which she might have had might by possibility have been heir, and these she held for the term of her natural life.

28. For what was this humane provision of the common law intended?—35

For the sure and competent sustenance of the widow, and the better nurture and education of her children.

29. What three things are requisite to the consummation of the title to dower?—35

1. Marriage. 2. Seisin of the husband. 3. His death.

30. Upon what marriage does dower attach?—36

It attaches upon all marriages not absolutely void, and existing at the death of the husband; it belongs to a wife *de facto*, whose marriage is voidable by decree, as well as to a wife *de jure*.

31. What must the husband have had, and at what time, to entitle the wife to dower?—37

The husband must have had seisin of the land in severalty, and at some time during the marriage.

32. Does a title to dower attach on a joint seisin?—37

No.

33. Will a mere possibility of the estate being defeated by survivorship prevent dower?—37

It will.

34. How far did the old rule go on this subject?—37

It went so far as to declare, that if one joint-tenant aliens his share, his wife shall not be endowed, notwithstanding the possibility of the other joint-tenant taking by survivorship is destroyed by the severance; for the husband was never sole seised.

35. Is it sufficient to give a title to dower, that the husband had a seisin in law, without being actually seised?—37

It is.

36. What reason is given for the distinction on this point between dower and curtesy?—37

The reason is, that it is not in the wife's power to procure an actual seisin by the husband's entry, whereas the husband has always the power of procuring seisin of the wife's land.

37. If land descends to the husband as heir, and he dies before entry, will his wife be entitled to her dower?—37

She will, and this would be the case, even if a stranger should, in the intermediate time, by way of abatement, enter upon the land; for the law contemplates a space of time between the death of the ancestor, and the entry of the abator, during which time the husband had a seisin in law as heir.

38. But is it not necessary that the husband should have been seised either in fact or in law, to entitle to dower?—37

It is—and where the husband had been in possession for years, using the land as his own, and conveying it in fee, the tenant deriving title under him is concluded from controverting the seisin of the husband, in the action of dower. If, however, upon the determination of a particular freehold estate, the tenant holds over and continues his seisin, and the husband dies before entry, or if he dies before entry in a case of forfeiture for a condition broken, his wife is not dowable, because he had no seisin either in fact or in law.

39. Will the laches of the husband prejudice the claim of dower, when he has no seisin in law?—38

When he has no seisin in law it will, but not otherwise; and Perkins states general cases in illustration of the rule. So, if a lease for life be made before marriage, by a person seised in fee, the wife of the lessor will be excluded from her dower, unless the life estate terminates during coverture, because the husband, though entitled to the reversion in fee, was not seised of the *immediate* freehold. If the lease was made subsequent to the time that the title to dower attached, the wife is dowable of the land, and defeats the lease by title paramount.

40. Will a transitory seisin for an instant, when the same act that gives the estate to the husband conveys it out of him, as in the case of a conusee of a fine, be sufficient to give the wife dower?—38

It will not.—The same doctrine applies when the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor, or to a third person, to secure the purchase money in whole or in part. Dower cannot be claimed as against rights under that mortgage. The husband is not deemed sufficiently or beneficially seised by such an instantaneous passage of the fee in and out of him, to entitle his wife to dower as against the mortgagee, and this conclusion is agreeable to the manifest justice of the case. The widow, in this case, on foreclosure of the mortgage and sale of the mortgaged premises, will be entitled to her claim to the extent of her dower in the surplus proceeds, after satisfying the mortgage; and if the heir redeems, or she brings her writ of dower, she is let in for her dower, on contributing her proportion of the mortgage debt.

42. How must the husband be seised, to create a title to dower?—39

He must be seised of a freehold in possession, and of an estate of immediate inheritance in remainder or reversion.

43. Does dower attach to all real hereditaments?—40

It does.

44. What is the reason of the American rule, giving dower in equities of redemption?—45

The reason is, that the mortgagor, so long as the mortgagee does not exert his right of entry or foreclosure, is regarded as being legally as well as equitably seised in respect to all the world, but the mortgagee and his assigns.

45. Will dower be defeated upon the restoration of the seisin under the prior title in the case of defeasible estates, as in the case of re-entry for a condition broken, which abolishes the intermediate seisin ?—47

It will.

46. Will a recovery by actual title against the husband, also defeat the wife's dower ?—47

Yes.

47. But what if he give up the land by default and collusively ?—47

The statute of Westminster 2, c. 4. preserved the wife's dower, unless the tenant could show affirmatively a good seisin out of the husband and in himself.

48. By what is the wife's dower liable to be defeated, on a general principle ?—49

By every subsisting claim or encumbrance, in law or equity, existing before the inception of the title, and which would have defeated the husband's seisin.

49. If the husband and wife levy a fine, or suffer a common recovery, is the wife barred of her dower ?—50

She is.

50. Does a divorce, *a vinculo matrimonii*, bar the claim of dower ?—53

It does.

51. May the wife be barred of her dower, by having a joint estate, usually denominated a *jointure*, settled upon her and her husband, and in case of his death to be extended to the use of the wife during her life ?—54

She may.

52. What four provisions must be complied with, in a jointure to bar a dower ?—54

1. It must take effect immediately on the death of the husband. 2. It must be for the wife's life. 3. It must be made and declared to be in satisfaction of her whole dower. 4. It must be to the wife herself, and not to any other person in trust for her.

53. Is a conveyance to trustees, for the use of the wife after the husband's death, in point of law a jointure ?—54, 55

No; but such a settlement, if in other respects good, will be enforced in chancery as an equitable bar of dower; and courts of equity have greatly relieved the parties from the strict legal construction given to the statute. It has also been settled, after great discussion in the English House of Lords, in the case of *Drury* v. *Drury*, and in New York, in *M'Cartee* v. *Teller*, that a jointure on an infant before coverture, bars her dower, notwithstanding her infancy, on the ground of its being a provision by the husband for the wife's support. It was considered to be a bar, *a provisione viri* and not *ex contractu*; and the assent of the wife was held not to be an operative circumstance, though the ante-nuptial contract was, in that case, executed by the infant in the presence of her guardian. An equitable jointure, or a competent and certain provision for the wife, in lieu of dower if assented to by the father or the guardian of the infant before marriage, will also, in analogy to the statute, constitute an equitable bar. But the conveyance before marriage of an estate to the wife, to continue during widowhood, by way of jointure, or if made to depend on any other condition, will not bar her dower, even if she be an adult, unless, when a widow, she enters and accepts the qualified freehold. The legal or equitable provision must be a fair equivalent to the dower estate, to make it absolutely binding in the first instance. In New York, the statute of 27 Hen. VIII. concerning jointures, was, in 1787, adopted *verbatim*; but it has been altered and improved by the new revised statutes; and the principle in equity, allowing jointures to exist also by conveyance of lands to a trustee, in trust for the wife, has been introduced into the statute law, which provides, that if "an estate in lands be conveyed to a person and his intended wife, or to such intended wife alone, or to any other person in trust for such person and his intended wife, or in trust for such wife alone, for the purpose of creating a jointure for such intended wife, and with her assent, such jointure shall be a bar to any right or claim of dower, &c.; and the evidence of the assent of the wife shall be, by her becoming a party to the conveyance, if of age, and, if an infant, by her joining with her father or guardian therein."

The statute of 27 Hen. VIII. further provided, that if the settlement in jointure was made after marriage, the wife should have her election, if she survived her husband, to take it in lieu of dower, or to reject it, and betake herself to her dower at common law. So, if she was fairly evicted by law from her jointure, or any part of it, the deficiency was to be supplied from other lands, whereof she would have been otherwise dowable. Both these provisions formed a part of the statute of New York, in 1787, and they have probably been adopted in all the states where the law of jointure in bar of dower has been introduced.

54. Is it not settled that a collateral satisfaction, consisting of money or other chattel interests, given by will, and accepted by the wife after her husband's death, will constitute an equitable bar of dower?—57

It is.

55. Have not the New York revised statutes, embodied most of these principles of law and equity, with some variations and amendments?—58

They have.

56. What do the New York revised statutes, together with the laws of Massachusetts and Connecticut, declare respecting dower?—58

They declare, that any pecuniary provision made before marriage in lieu of dower, if duly assented to by the wife, shall bar her dower.

57. What was a principle of the common law, that if the husband seised of an estate of inheritance, exchanged it for other lands?—59

The wife could not have dower of both estates, but should be put to her election.

58. Is not this principle also introduced into the New York revised statutes?—59

Yes; and the widow is required to evince her election to take dower out of the lands given in exchange, by the commencement of proceedings to recover it, within one year after her husband's death, or else she shall be bound to take her dower out of the lands received in exchange.

59. What is the usual way of barring dower in this country?—59

By joining with the wife her husband in a deed of conveyance of the land, containing apt words of grant or release on her part, and acknowledging the same privately, apart from her husband, in the mode prescribed by the statute laws of the several states. This practice is probably coeval with the settlement of the country; and it has been supposed to have taken its rise in Massachusetts, from the colonial act of 1644. The wife must join with her husband in the deed, and there must be apt words of grant, showing an intention on her part to relinquish her dower.

60. May dower be recovered by bill in equity, as well as by action at law?—71

Yes. The jurisdiction of chancery over the claim of dower, has been thoroughly examined, clearly asserted, and definitively established. It is a jurisdiction concurrent with that of law; and when the legal title to dower is in controversy, it must be settled at law; but if that be admitted or settled, full and effectual relief can be granted to the widow in equity, both as to the assignment of dower, and the damages. The equity jurisdiction was so well established, and in such exercise in England, that Lord Loughborough said, that writs of dower had almost gone out of practice. The equity jurisdiction has been equally entertained in this country, though the writ of dower *unde nihil habet*, is the remedy by suit most in practice.

61. How is the claim of dower considered in New Jersey?—71

It is considered, as emphatically, if not exclusively, within the cognizance of the common law courts.

62. What are the surrogates in New York, in addition to the legal rem-

edies at law and in equity, empowered and directed to do, upon the application either of the widow, or of the heirs or owners?—72

To appoint three freeholders to set off by admeasurement the widow's dower.

63. Has not this convenient and summary mode of assignment of dower, under the direction of the courts of probates in the several states, probably, in a great degree, superseded the common law remedy by action?—72

It has.

64. When a widow is legally seised of her freehold estate, as doweress, may she bequeath the crop in the ground of the land holden by her in dower?—72

She may.

65. To what is every tenant for life entitled of common right?—72

To take reasonable *estovers*, that is, wood from off the land, for fuel, fences, agricultural erections, and other necessary improvements.

66. Is he entitled, through his lawful representatives, to the profits of the growing crops, in case the estate determines by his death, before the produce can be gathered?—73

He is.

67. What are the profits termed, and on what principles are they given?—73

They are termed emblements, and they are given on very obvious principles of justice and policy, as the time of the determination of the estate is uncertain.

68. In what cases does this rule apply?—73

It extends to every case where the estate for life determines by the act of God, or by the act of the law, and not to cases where the estate is determined by the voluntary, wilful, or wrongful act of the tenant himself.

69. To what only is the doctrine of emblements applicable?—73

To the products of the earth which are annual, and raised by the yearly expense and labour of the tenant.

70. Are the tenants by the curtesy, and in dower, and for life or years, answerable for waste committed by a stranger?—77

They are; and they take their remedy over against him; and it is a general principle, that the tenant, without some special agreement to the

contrary, is responsible to the reversioner for all injuries amounting to waste, by whomsoever the injury may have been committed, with the exception of the acts of God, and public enemies, and the acts of the reversioner himself.

71. Is the tenant like a common carrier?—77

He is; and the law in this instance is founded on the same great principles of public policy. The landlord cannot protect the property against strangers; and the tenant is on the spot, and presumed to be able to protect it.

72. What were the ancient remedies for waste?—77

The ancient remedies were writs of *estrepement*, and waste; but they are now essentially obsolete.

73. Did any prohibition against waste lay against the lessee for life or years, deriving his interest from the act of the party, at common law?—77

No; the remedy was confined to those tenants who derived their interest from the act of the law; but the timber cut was, at common law, the property of the owner of the inheritance; and the words in the lease, *without impeachment of waste*, had the effect of transferring to the lessee the property of the timber.

74. What is the modern remedy in chancery?—77

Injunction; which is broader than that at law; and equity will interpose in many cases, and stay waste, where there is no remedy at law.

75. To what is the chancery remedy limited?—77

It is limited to cases in which the title is clear and undisputed; and the remedy by an action on the case in the nature of waste, has been held not to lie for permissive waste.

76. Was not the provision in the statute of Gloucester, giving, by way of penalty, the forfeiture of the place wasted, and treble damages, re-enacted in New York and Virginia?—80

It was; and it is the acknowledged rule of recovery, in some of the other states, in the action of waste.

77. But has not the writ of waste gone out of use, and what is its substitute?—81

It has, and a special action on the case, in the nature of waste, is the substitute; and this action, which has superseded the common law remedy, relieves the tenant from the penal consequences of waste under the statute of Gloucester.

78. What does the plaintiff in this action upon the case recover?—81

He recovers no more than the actual damages which the premises have sustained.

LECTURE LVI.

OF ESTATES FOR YEARS, AT WILL, AND AT SUFFERANCE.

1. What is a lease for years?—85

It is a contract for the possession and profits of land, for a determinate period, with the recompense of rent; and it is deemed an estate for years, though the number of years should exceed the ordinary limit of human life.

2. Is an estate for life a higher and greater estate than an estate for years?—85

It is; notwithstanding the lease, according to Sir Edward Coke, should be for a thousand years or more; and if the lease be made for a less time than a single year, the lessee is still ranked among tenants for years.

3. May leases for years be made to commence *in futuro*?—94

Yes; for, being chattel interests, they never were required to be created by feoffment and livery of seisin.

4. If land be let upon shares, for a single crop only, does that amount to a lease?—95

No; the possession remains in the owner.

5. How may a term for years be defeated?—99

By way of merger, when it meets another term immediately expectant thereon. The elder term merges in the term in revesion or remainder. A merger also takes place, when there is a union of the freehold or fee and the term, in one person, in the same right, and at the same time.

6. What is an estate at will?—110

An estate at will is where one man lets land to another, to hold at the will of the lessor.

7. Who is a tenant at sufferance ?—116

A tenant at sufferance is one that comes into possession of land by lawful title, but holdeth over by wrong, after the determination of his interest.

8. What is the general rule to maintain trespass *quare clausum ?*—119

That there must be an actual possession in the plaintiff when the trespass was committed, or a constructive possession in respect of the right being actually vested in him. The ground of the action of trespass is the injury to the possession.

LECTURE LVII.

OF ESTATES UPON CONDITION.

1. What are estates upon condition, and how are they divided by Littleton ?—121

Estates upon condition are such as have a qualification annexed to them, by which they may, upon the happening of a particular event, be created, or enlarged, or destroyed. They are divided by Littleton into estates upon condition implied or in law, and estates upon condition express or in deed.

2. What are estates upon condition in law ?—121

They are such as have a condition impliedly annexed to them, without any condition specified in the deed or will.

3. Of what extraction is the doctrine of estates upon condition, and from what did it result ?—122

It is of feudal extraction, and resulted from the obligations arising out of the fuedal relation.

4. What are conditions in a deed ?—123

The conditions are expressly mentioned in the contract between the parties, and the object of them is either to avoid, or defeat an estate ; as if a man (to use the case put by Littleton,) enfeoffs another in fee, reserving to himself and his heirs a yearly rent, with an express condition annexed, that if the rent be unpaid, the feoffor and his heirs may enter, and

hold the lands free of the feoffment. So, if a grant be to A. in fee, with a proviso, that if he did not pay twenty pounds by such a day, the estate should be void. It is usual, in the grant, to reserve in express terms, to the grantor and his heirs, a right of entry for the breach of the condition; but the grantor and his heirs may enter, and take advantage, of the breach, by ejectment, though there be no clause of entry.

5. How are conditions in a deed divided?—124

Into general and special. The former puts an end altogether to the tenancy, on entry for the breach of the condition; but the latter only authorizes the reversioner to enter on the land, and take the profits to his own use, and hold the land by way of pledge until the condition be fulfilled.

6. What is a collateral limitation?—129

It is another refinement belonging to this abstruse subject of limited and conditional estates. It gives an interest for a specified period, but makes the right of enjoyment to depend on some collateral events, as a limitation of an estate to a man and his heirs, tenants of the manor of Dale, or to a woman during widowhood, or to C. till the return of B. from Rome, or until B. shall have paid him twenty pounds. The event marked for the determination of the estate is *collateral* to the time of continuance.

LECTURE LVIII.

OF THE LAW OF MORTGAGE.

1. What is a mortgage?—135

It is the conveyance of an estate, by way of pledge, for the security of debt, and to become void on payment of it.

2. In whom is the legal ownership vested, and into what four heads is it divisible?—135

The legal ownership is vested in the creditor; but, in equity, the mortgagor remains the actual owner, until he is debarred by his own default, or by judicial decree; and it is divided under the following heads.

1. Of the general nature of mortgages.
2. Of the mortgagor's estate and equity of redemption.
3. Of the estate and rights of the mortgagee.
4. Of foreclosure.

3. From what does the Engish law of mortgages appear to have been borrowed ?—136

From the civil law; and the Roman *hypotheca* corresponded very closely with the description of a mortgage in our law.

4. On what is the use of mortgages founded ?—136

On the wants and convenience of mankind, and would naturally follow the progress of order, civilization, and commerce.

5. Is there not a material distinction to be noticed between a pledge and a mortgage ?—138

Yes.

6. What is a pledge or pawn ?—138

It is a deposit of goods, redeemable on certain terms, and either with or without a fixed period for redemption.

7. May a mortgage arise in equity, out of the transaction of the parties, without any deed or express contract for that special purpose ?—149

Yes.

8. What is now well settled in the English law on this subject ?—151

It is settled that if the debtor deposits his title deeds with a creditor, it is evidence of a valid agreement for a mortgage, and amounts to an equitable mortgage, which is not within the operation of the statute of frauds.

9. In what case, and when was the earliest decision in support of the doctrine of equitable mortgages, by the deposit of the muniments of title ?—151

In the case of *Russell* v. *Russell*, in 1783, which decision is now deemed an established principle in English law.

10. Has not the vendor of real estate a lien for the purchase money ? —151

He has, under certain circumstances.

11. Upon the execution of a mortgage, in whom does the estate vest ? —154

It vests in the mortgagee, subject to be defeated upon performance of the condition.

12. Can the mortgagor be treated by the mortgagee as a trespasser ? —154

No; he cannot, neither shall his assignee, until the mortgagee has regularly recovered possession, by writ of entry or ejectment. The mortgagor in possession is considered to be so with the mortgagee's assent, and is not liable to be treated as a trespasser.

13. Is not the mortgagor allowed in New York, even to sustain an action of trespass against the mortgagee, or those claiming under him, if he undertakes an entry while the mortgagor is in possession?—151

He is.

14. How was it anciently held?—155

It was anciently held, that so long as the mortgagor remained in possession, with the mortgagee, and without any covenant for the purpose, he was a tenant at will.

15. What is the equity doctrine in regard to mortgages?—159

It is, that the mortgage is a mere security for the debt, and only a chattel interest, the mortgagor continues the real owner of the fee.

16. How is the equity of redemption considered?—159

It is considered to be the real and beneficial estate, tantamount to the fee at law; and it is, accordingly, held to be descendible by inheritance, devisable by will, and alienable by deed, precisely as if it were an absolute estate of inheritance at law.

17. May not the mortgagor exercise the rights of an owner while in possession?—160

He may, provided he does nothing to impair the security; and a court of chancery will always, on the application of the mortgagee, and with that object in view, stay the commission of waste by process of injunction.

18. Will an action at law, by the mortgagee, lie for the commission of waste?—161

No; because he has only a contingent interest; and yet actions of trespass, *quare clausum fregit*, by the mortgagee, for the commission of waste, by destroying timber, or removing fixtures, have been sustained against the mortgagor in possession, in those states where they have no separate equity courts with the plenary powers of a court of chancery.

19. If the mortgagee obtains possession of the mortgaged premises before foreclosure, for what will he be accountable?—165

For the actual receipts of rents and profits, and nothing more, unless they were reduced, or lost by his wilful default, or gross negligence.

20. What does the mortgagee impose upon himself by taking possession, and to what is he bound?—166

He imposes upon himself the duty of a provident owner, and he is bound to recover what such an owner would, with reasonable diligence, have received.

21. May he charge for the expenses of a bailiff or receiver?—166

Yes, when it becomes proper to employ one; but he is not entitled to make any charge, by way of commission, for his own trouble in collecting and receiving the rents.

22. Upon what does the mortgagee's right essentially depend?—168

Upon the registry of his mortgage, and upon the priority of that registry.

23. How must every conveyance of real estate be recorded to be valid by the statute law of New York?—168

It must be recorded in the clerk's office of the county in which the real estate is situated, after being duly proved or acknowledged, and certified, as the law prescribes.

24. If not recorded, in what respect will such conveyance be void?—167

It is void as against any subsequent purchaser, or mortgagee, in good faith, and for a valuable consideration, of the same estate, or any portion thereof, whose conveyance shall be first duly recorded.

25. Has a mortgage not registered a preference over a subsequent docketed judgment?—173

Yes; a mortgage unregistered is still a valid conveyance, and binds the estate.

26. Suppose the purchaser at the sale on execution, under the judgment, has his deed first recorded, who then will have the preference, and on what will the question of right turn?—173

The purchaser will gain a preference by means of the record over the mortgage, and the question of right turns upon the fact of priority of the record, in cases free from fraud.

27. How is the rule in Pennsylvania on this subject?—173

In Pennsylvania the docketed judgment is preferred, and not unreasonably; for there is much good sense, as well as simplicity and certainty, in the proposition, that every incumbrance, whether it be a registered deed or docketed judgment, should, in cases free from fraud, be satisfied according to the priority of the lien upon record, which is open for public inspection.

28. In what one instance will a mortgage have a preference over a prior docketed judgment?—173

In the case of a sale and conveyance of land, and mortgage taken at the same time, in return, to secure the payment of the purchase money.

29. May the right of equity of redemption be barred by the length of time?—186

It may.

30. If the mortgagee omits to give proper notice, whether directed by the power or not; may not the sale be impeached in chancery?—189

It may.

31. Is not the sale under a power, if regularly and fairly made, according to the directions of the statute, a final and conclusive bar to the equity of redemption?—190

It is.

32. How long has this been the policy and language of the law of New York?—190

From the time of the first introduction of the statute regulation on the subject, in March, 1774.

33. Will a sale under a power, as well as under a decree, bind the infant heirs?—191

It will; for the infant has no day, after he comes of age to show cause, as he has where there is the strict technical foreclosure, and as he generally has in the case of decrees.

34. Has a court of equity a competent power to require, by injunction, and enforce by process of execution, delivery of possession?—192

It has; and the power is founded upon the simple elementary principle, that the power of the court to apply the remedy is co-extensive with its jurisdiction over the subject-matter.

35. Does the English practice of opening biddings on a sale of mortgaged pemises, under a decree, prevail to any great extent in this country?—192

No.

36. What was the object of opening biddings, at a sale of mortgaged premises?—192

The object was to aid creditors by an increase of the bid.

37. What does Lord Eldon say on this subject?—192

He condemned the practice, as injurious to the sale; and he observed, that a great many estates were thrown away upon the speculation that there would be an opportunity of purchasing afterwards by opening biddings.

38. Does or does not the English method of selling under a decree vary greatly from ours?—192

It does.

LECTURE LIX.

OF ESTATES IN REMAINDER.

1. Of what two kinds are estates in expectancy?—196

The first is created by the act of the parties, and called a *remainder;* the second by the act of the law, and called a *reversion.*

2. Under what nine heads does the commentator treat of remainders? —196

They are as follow:—

1. Of the general nature of remainders.
2. Of vested remainders.
3. Of contingent remainders.
4. Of the rule in Shelley's case.
5. Of the particular estate.
6. Of remainders limited by way of use.
7. Of the time within which a contingent remainder must vest.
8. Of the destruction of contingent remainders.
9. Of some remaining properties of contingent remainders.

3. What is a remainder?—196

It is a remnant of an estate in land, depending upon a particular prior estate, created at the same time, and by the same instrument, and limited to arise immediately on the determination of that estate, and not in abridgment of it.

4. How by the New York revised statutes is a remainder defined? —197

It is defined to be an estate limited to commence in possession at a future day, on the determination, by lapse of time, or otherwise, of a precedent estate, created at the same time.

5. Of what may a remainder consist?—197

It may consist of the whole remnant of the estate; as in the case of a lease to A for years, remainder to B in fee; or it may consist of a part only of the residuary estate, and there may be a reversion beyond it, left vested in the grantor, as in the case of a grant to A for years, remainder to B for life; or there may be divers remainders over, exhausting the whole *residuum* of the estate, as in the case of a grant to A for years, remainder to B for life, remainder to C in tail, remainder to D in fee.

6. What are cross-remainders?—201

They are another qualification of these expectant estates, and they may be raised expressly by deed, and by implication in a devise. If a devise be of one lot of land to A, and of another lot to B, in fee, and if either dies without issue, the survivor to take, and if both die without issue, then to C in fee, A and B have cross-remainders over by express terms; and on the failure of either, the other, or his issue, takes, and the remainder to C is postponed; but if the devise had been to A and B of lots to each, and remainder over on the death of both of them, the cross-remainders to them would be implied.

7. Of how many sorts are remainders?—201

Two; vested and contingent.

8. What is the definition of a vested remainder, by the New York revised statutes?—201

It is "when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate."

9. Are vested remainders actual estates?—204

They are, and may be conveyed by any of the conveyances operating by force of the statute of uses.

10. What is a contingent remainder?—206

A contingent remainder is limited so as to depend on an event or condition which is dubious and uncertain, and may never happen or be performed, or not until after the determination of the particular estate.

11. Into what four classes are contingent remainders divided?—206

1. The first sort is where the remainder depends on a contingent determination of the preceding estate, and it remains uncertain whether the use or estate limited *in futuro* will ever vest. Thus, if A makes a feoffment to the use of B, till C returns from Rome, and after such return remainder over in fee, the remainder depends entirely on the uncertain or contingent determination of the estate in B, by the return of C from Rome.

2. The second sort is where the contingency on which the remain-

der is to take effect is independent of the determination of the preceding estate, and must precede the remainder. As if a lease be to A for life, remainder to B for life, and if B die before A, remainder to C for life; the event of B dying before A, does not affect the determination of the preceding estate, but it is a dubious event which must precede, in order to give effect to the remainder in C.

3. A third kind is where the condition upon which the remainder is limited is certain in event, but the determination of the particular estate may happen before it. Thus, if a grant be made to A for life, and, after the death of B, to C in fee; here, if the death of B does not happen until after the death of A, the particular estate is determined before the remainder is vested, and it fails from the want of a particular estate to support it.

4. The fourth class of contingent remainders is, where the person to whom the remainder is limited is not ascertained, or not in being. As in the case of a limitation to two persons for life, remainder to the survivor of them; or in the case of a lease to A for life, remainder to the right heirs of B, then living. B cannot have heirs while living, and if he should not die until after A, the remainder is gone, because the particular estate failed before the remainder could vest.

12. Is there not a distinction which operates by way of exception to the third class of contingent remainders?—209

There is; thus, a limitation for a long term of years, as, for instance, to A for eighty years, if B should live so long, with the remainder over, after the death of B, to C in fee, gives a *vested* remainder to C, notwithstanding it is limited to take effect on the death of A, which possibly may not happen until after the preceding estate for eighty years.

13. Do not exceptions exist also to the generality of the rule which governs the fourth class of remainders?—209

They do; thus, if the ancestor takes an estate of freehold, and an immediate remainder is limited thereon, in the same instrument, to his heirs in fee, or in tail, the remainder is not contingent, or in abeyance, but is immediately executed in possession in the ancestor, and he becomes seised in fee, or in tail. So, if some intermediate estate for life, or in tail, be interposed between the estate of freehold in A and the limitation to his heirs, still the remainder to his heirs vests in the ancestor, and does not remain in contingency or abeyance. If there be created an estate for life to A, remainder to the heirs of his body, this is not a contingent remainder to the heirs of the body of A, but an immediate estate tail in A; or if there be an estate for life to A, remainder to B for life, remainder to the right heirs of A, the remainder in fee is here vested in A, and after the death of A, and the determination of the life estate in B, the heirs of A take by descent as heirs, and not by purchase. The possibility that the freehold in A may determine in his lifetime, does not keep the subsequent limitation to his heirs from attaching in him; and it is a general rule, that when the ancestor takes an estate of freehold, and there be

in the same conveyance an unconditional limitation to his heirs, in fee, or in tail, either immediately, without the intervention of any estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately with the interposition of some such intervening estate; the subsequent limitation vests immediately in the ancestor, and becomes, as the case may be, either an estate of inheritance in possession, or a vested remainder.

14. Must the freehold in the ancestor and the limitation to his heirs, be by the same deed or instrument?—212

They must, or they will not consolidate in the ancestor.

15. Must there be a particular estate to precede a remainder?—233

Yes, for it necessarily implies, that a part of the estate has already been carved out of it, and vested in immediate possession in some other person.

16. Must the particular estate be valid in law, and formed at the same time, and by the same instrument, with the remainder?—233

Yes.

17. If the particular estate be void in its creation, or be defeated afterwards, will the remainder created by a conveyance at common law, resting upon the same title, be defeated also?—234

It will, as being, in such a case, a freehold commencing *in futuro*.

18. When must the interest to be limited, as a remainder, either vested or contingent, commence or pass out of the grantor?—248

At the time of the creation of the particular estate, and not afterwards.

19. Must the remainder be so limited, as to await the natural determination of the particular estate?—249

It must, and cannot take effect in possession upon an event which prematurely determines it.

20. Does not the New York revised statutes allow a remainder to be limited on a contingency?—250

They do; on a contingency, which, in case it should happen, would operate to abridge or determine the precedent estate; and every such remainder is to be construed a conditional limitation, and to have the same effect as such a limitation would have at law.

21. If the particular estate determines, or be destroyed, before the contingency happens on which the expectant estate depended, and leaves no right of entry, is not then the remainder annihilated?—252

Yes.

22. By what are conveyances to uses governed ?—256

By doctrines derived from courts of equity ; and the principles which originally controlled them, they retained when united with the legal estate.

23. Are all contingent and executory interests, assignable in equity ? —261

They are ; and will be enforced, if made for a valuable consideration ; and it is settled, that all contingent estates of inheritance, as well as springing and executory uses, and possibilities, coupled with an interest, where the person to take is certain, are transmissible by descent, and devisable. If the person be not ascertained, they are not then possibilities coupled with an interest, and they cannot be either devised, or descend, at common law. Contingent and executory, as well as vested interests, pass to the real and personal representatives, according to the nature of the interest, and entitle the representatives to them when the contingency happens.

LECTURE LX.

OF EXECUTORY DEVISES.

1. What is an executory devise ?—263

It is a limitation by will, of a future contingent interest in lands, contrary to the rules of limitation of contingent estates in conveyances at law.

2. What if the limitation by will does not depart from those rules prescribed for the government of contingent remainders ?—263

It is in that case, a contingent remainder, and not an executory devise.

3. For what reason was executory devises instituted ?—263

To support the will of the testator ; for when it was evident that he intended a contingent remainder, and when it could not operate as such by the rules of law, the limitation was then, out of indulgence to wills, held to be good as an executory devise.

4. What does the history of executory devises present ?—264

An interesting view of the stable policy of the English common law, which abhorred perpetuities, and the determined spirit of the courts of justice to uphold the policy, and keep property free from the fetters of entailments, under whatever modification or form they might assume.

5. What says the learned commentator, respecting perpetuities, as applied to real estates ?—264

He says, they were conducive to the power and grandeur of ancient families, and gratifying to the pride of the aristocracy; but they were extremely disrelished by the nation at large, as being inconsistent with the free and unfettered enjoyment of property.

6. For what were common recoveries invented?—264

To bar estates tail, and then, on the other hand provisoes and conditions not to alien with a cesser of the estate on any such attempt by the tenant, were introduced to recall perpetuities.

7. How many kinds of executory devises are there relative to real estates?—268

Two.

8. What is the first?—268

The first is where the devisor parts with his whole estate, but, upon some contingency, qualifies the disposition of it, and limits an estate on that contingency. Thus, if there be a devise to A for life, remainder to B in fee, provided that if C should, within three months after the death of A, pay one thousand dollars to B, then to C in fee, this is an executory devise to C, and if he dies in the lifetime of A, his heirs may perform the condition.

9. What is the second?—258

The second is where a testator gives a future interest to arise upon a contingency, but does not part with the fee in the mean time; as in the case of a devise to the heirs of B, after the death of B, or a devise to B in fee, to take effect six months after the testator's death, or a devise to the daughter of B, who shall marry C within fifteen years.

10. In what three very material points, does an executory devise, differ from a remainder?—269

1. An executory devise, needs not any particular estate to precede and support it, as in the case of a devise in fee to A upon his marriage. Here is a freehold limited to commence *in futuro*, which may be done by devise, because the freehold passes without livery of seisin; and until the contingency happens, the fee passes in the usual course of descent, to the heirs at law.

2. A fee may be limited after a fee, as in the case of a devise of land to B in fee, and if he dies without issue, or before the age of twenty-one, then to C in fee.

3. A term for years may be limited over, after a life estate created in the same. At law, the grant of the term to a man for life would have been a total disposition of the whole term. Nor can an executory devise or bequest be prevented or destroyed, by any alteration whatsoever, in the estate out of which, or subsequently to which, it is lim-

ited. The executory interest is wholly exempted from the power of the first devisee or taken.

11. If an executory devise be limited to take effect after a dying without heirs, or without issue, or on failure of issue, or without leaving issue, is the limitation held to be void?—273

It is, because the contingency is too remote, as it is not to take place until after an indefinite failure of issue.

12. What is a definite failure of issue?—273

A definite failure of issue is, when a precise time is fixed by the will for the failure of issue, as in the case of a devise to A, but if he *dies without lawful issue living at the time of his death.*

13. What is an indefinite failure of issue?—273

It is a proposition the very converse of the other, and means a failure of issue, whenever it shall happen, sooner or later, without any fixed, certain, or definite period, within which it must happen.

14. Have not the New York revised statutes, put an end to all semblance of any distinction in the contingent limitations of real and personal estates?—283

They have, by declaring that all the provisions relative to future estates should be construed to apply to limitations of chattels real, as well as of freehold estates; and that the absolute ownership of personal property shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance, and until the termination, of not more than two lives in being at the date of the instrument containing the limitation or condition, or, if it be a will, in being at the death of the testator.

15. When there is an executory devise of the real estate, and the freehold is not, in the mean time, disposed of, to whom does the inheritance descend?—283

To the testator's heir, until the event happens.

16. Have not the New York revised statutes, allowed the accumulation of rents and profits of real estate, for the benefit of one or more persons, by will or deed?—285

They have, but the accumulation must commence either on the creation of the estate out of which the rents and profits are to arise, and it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority; or, if directed to commence at any time subsequent to the creation of the estate, it must commence within the time authorized by the statute for the vesting of future estates, and during the minority of the persons for whose benefit it is directed,

and terminate at the expiration of such minority. If the direction for accumulation be for a longer time than during the minorities aforesaid, it shall be void for the excess of time; and all other directions for the accumulation of rents and profits of real estate are void.

LECTURE LXI.

OF USES AND TRUSTS.

1. What is a use?—288

A use is where the legal estates of land is in A, in trust, that B shall take the profits, and that A will make and execute estates according to the direction of B.

2. What was the trustee to all intents and purposes?—288

He was the real owner of the estate at law.

3. What title had the *cestui que use?*—288

He had only a confidence or trust, for which he had no remedy at the common law.

4. Did uses exist under the Roman law, and if so, under what name?—288

They did exist under the name of *fidei commissa*, or trusts.

5. By whom were they introduced, and for what purpose?—288

They were introduced by testators, to evade the municipal law, which disabled certain persons, as exiles and strangers, from being heirs or legatees.

6. Was not the contrast between uses and estates at law, extremely striking?—291

Yes; when uses were created before the statute of uses, there was a confidence that the feoffee would suffer the feoffer to take the profits, and that the feoffee, upon the request of the feoffer, or notice of his will, would execute the estate to the feoffor and his heirs, or according to his directions. When the direction was complied with, it was essentially a conveyance by the feoffer, through his agent the feoffee, who, though even an infant or *feme covert*, was deemed in equity competent to execute power, and appoint a use. The existing law of the land was equally eluded in the selection of the appointee, who might be a corporation, or alien, or traitor, and in the mode of the direction, which might be by parol.

7. How do shifting or secondary uses take effect?—296

They take effect in derogation of some other estate, and are either limited by the deed creating them, or authorized to be created by some person named in it.

8. To what are springing uses limited ?—297

They are limited to arise on a future event, where no preceding estate is limited, and they do not take effect in derogation of any preceding interest.

9. To what are future or contingent uses limited ?—299

To take effect as remainders. If lands be granted to A, in fee, to the use of B, on his return from Rome, it is a future contingent use, because it is uncertain whether B will ever return.

10. If the use limited by deed expired, or could not vest, or was not to vest but upon a contingency, to whom did the use result back ?—299

To the grantor, who created it.

11. Is the rule the same when no uses were declared by the conveyance ?—298

Yes.

12. What objections were made to uses and trusts, as they now, or then did exist, in the remarks which accompanied the bill for the revision of the New York statutes ?—299

The three following, viz:

1. They render conveyances more complex, verbose, and expressive than is requisite, and perpetuate in deeds the use of a technical language, unintelligible as a "mysterious jargon," to all but the members of one learned profession.

2. Limitations intended to take effect at a future day, may be defeated by a disturbance of the seisin, arising from a forfeiture or a change of the estate of the person seised to the use.

3. The difficulty of determining whether a particular limitation is to take effect as an executed trust, as an estate at common law, or as a trust.

13. How were these objections deemed ?—299

They were deemed so strong and unanswerable as to induce the revisers to recommend the entire abolition of uses. They considered, that by making a grant, without the actual delivery of possession, or livery of seisin, effectual to pass every estate and interest in land, the utility of conveyances deriving their effect from the statute of uses would be superseded; and that the new modifications of property which uses have sanctioned, would be preserved by repealing the rules of the common law, by which they were prohibited, and permitting every estate to be created by grant which can be created by devise.

14. What have the New York revised statutes declared respecting uses and trusts, except as authorized or modified in the article ?—299

They have declared, that they were abolished, and every estate and interest in land is declared to be a legal right, or cognizable in the courts of law, except where it is otherwise provided in the chapter ; and every estate held as a use executed under any former statute, confined as a legal estate. The conveyance by grant is a substitute for the conveyance to uses ; and the future interests in land may be conveyed by grant as well as by devise. The statute gives the legal estate, by virtue of a grant, assignment, or devise ; and the word *assignment* was introduced to make the assignment of terms, and other chattel interests, pass the legal interest in them, as well as in freehold estates ; though, under the English law, the use in chattel interests was not executed by the statute of uses.

15. Will not the operation of the statute of New York, in respect to the doctrine of uses, have some slight effect upon the forms of conveyance ? —300

Yes, and it may give them more brevity and simplicity. But it would be quite visionary to suppose that the science of law, even in the department of conveyancing, will not continue to have its technical language, and its various, subtle, and profound learning, in common with every other branch of human science. The transfer of property assumes so many modifications, to meet the varying exigencies of speculation, wealth, and refinement, and to supply family wants and wishes, the doctrine of conveyancing must continue essentially technical, under the incessant operation of skill and invention. The abolition of uses does not appear to be of much moment, but the changes which the law of trusts has been made to undergo, becomes extremely important.

16. To what extent are express or active trusts allowed ?—309

1. To sell land for the benefit of creditors.
2. To sell, mortgage, or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon.
3. To receive the rents and profits of lands, and apply them to the use of any person ; or to accumulate the same for the purposes, and within the limits, already mentioned.

17. May the court accept the resignation of a trustee ?—310

Yes ; and it may also discharge him, or remove him for just cause, and supply the vacancy, or any want of trustees, in its discretion.

18. Was it not the object of the New York revised statutes to abolish all trusts, except the express trusts which are enumerated, and resulting trusts ?—311

It was.

LECTURE LXII.

OF POWERS.

1. What are the powers with which we are most familiar in this country?—315

The common law authorities, of simple form and direct application. But the powers now alluded to, are of a more latent and mysterious character, and they derive their effect from the statute of uses.

2. What are those powers, and how have the estates, arising from the execution of them been classed?—315

They are declarations of trust, and modifications of future uses; and the estates arising from the executions of them have been classed under the head of contingent uses.

3. What are all these powers in point of fact?—315

Powers of revocations and appointment.

4. Who are the parties concerned in making a power?—316

They are the donor, who confers the power, the appointor or donee, who executes it, and the appointee, or person in whose favour it is executed.

5. How are powers usually classed?—317

1. Powers appendant, or appurtenant.
2. Powers collateral, or in gross.
3. Powers simply collateral.

This division is thought too artificial. Mr. Powell also divides powers into general and particular powers. This classification of powers is admitted to be important only with reference to the ability of the donee to suspend, extinguish, or merge the power.

6. What is the general rule respecting a power?—317

That it shall not be exercised in derogation of a prior grant by the appointor. But this whole division of powers is condemned, as too artificial and arbitrary.

7. How is a power defined by the New York revised statutes?—318

To be an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner, granting or reserving such power, might himself lawfully perform.

8. How has the statute of New York divided it?—317

Into general and special. A general power authorizes the alienation in fee, by deed, will, or charge, to any alienee whatever. The power is special when the appointee is designated, or a lesser interest than a fee is authorized to be conveyed. It is beneficial when no person other than the grantee has, by the terms of its creation, any interest in its execution. A general power is in trust, when any person other than the grantee of the power is designated as entitled to the whole, or part of the proceeds, or other benefit to result from the execution of the power.

9. When is a power special?—318

A power is special in trust, when the dispositions it authorizes are limited to be made to any person other than the grantee of the power, entitled to the proceeds or benefit thereof, or when any person other than the grantee is designated as entitled to any benefit from the disposition or charge authorized by the power.

10. Is any formal set of words requisite to create or reserve a power?—319

None at all, it may be created by deed or will.

11. When the mode in which a power is to be executed is not defined, in what may it be executed?—329

It may be executed by deed or will, or simply by writing.

12. May the power be executed without reciting it?—334

It may, or ever referring to it, provided the act shows that the donee had in view the subject of the power.

13. May a power of revocation and new appointment be reserved in a deed executing a power?—336

Yes, though the deed creating the power does not authorize it, and such powers may be reserved *toties quoties*.

14. Have not the New York revised statutes given due stability to powers that are beneficial, or in trust?—337

They have; and we would particularly refer the student and general reader to the Commentaries at large for more information on this subject. The learned commentator shows that the statutes have also cleared away, and very wisely, many difficulties, and given due and adequate relief to the creditor. To use his own words of the doctrine of uses, trusts, and powers, he says, "they are the foundation of those voluminous settlements to which we in this country are comparatively strangers: the groundwork of the operation of a family settlement is a conveyance of the fee to the grantee or releasee to uses; then follow the various modi-

fied interests in the shape of future uses, which constitute the essential part of the settlement; and with the laws relating to this subject no one can become too well acquainted; every citizen of the United States should be well informed on it."

LECTURE LXIII.

OF ESTATES IN REVERSION.

1. What is a reversion?—353

A reversion, is the return of land to the grantor, and his heirs, after the grant is over; or, according to the formal definition in the New York revised statutes; it is the residue of an estate left in the grantor, or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised.

2. What does a reversion necessarily assume?—353

That the original owner has not parted with his whole estate or interest in the land.

3. From what does sir William Blackstone say, that the doctrines of reversion are divided?—353

From the feudal constitution, but says our learned commentator, it would have been more correct, to have said, that some of the incidents attached to a reversion were of feudal growth, such as fealty, and the varying rule of descent between the cases of a reversion arising out of the original estate, and one limited by the grant of a third person.

4. Does a reversion arise by operation of law, or by deed, or will?—353

By operation of law. And it is a vested interest or estate, inasmuch as the person entitled to it has a fixed right of future enjoyment.

5. Is not a reversion an incorporeal hereditament?—354

It is, and may be conveyed either in whole, or in part, by grant, without livery of seisin.

6. Are reversions expectant on the determination of estates for years, immediate assets in the hands of the heir?—354

They are. But the reversion expectant on the determination of an estate for life, is not immediate assets during the continuance of the life estate, and the creditor takes judgment for assets *in futuro*.

7. Is the reversioner entitled to his action for an injury done to the inheritance ?—355

He is, because he has a vested interest.

8. What are the usual incidents to the reversion, under the English law ?—355

Fealty and rent, fealty, in its feudal sense, does not now exist in this country ; but rent is a very important incident, and passes with a grant of the reversion.

LECTURE LXIV.

OF A JOINT INTEREST IN ESTATES.

1. In what two ways may joint interest in land be had ?—357

Either in the title or in the possession.

2. Who are joint tenants ?—357

Joint tenants are persons who own lands by a joint title, created expressly by one and the same deed or will. They hold uniformly by purchase.

3. What is the doctrine of survivorship, or *jus accrescendi ?*—360

It is the distinguishing incident of title by joint tenancy ; and, therefore, at common law, the entire tenancy or estate, upon the death of any of the joint tenants, went to the survivors, and so on to the last survivor, who took an estate of inheritance.

4. Did the common law favour the title by joint tenancy ?—361

It did, by reason of the right of survivorship.

5. When were estates in joint tenancy abolished in New York ?—361

As early as February, 1786.

6. But what have the New York revised statutes re-enacted on this subject ?—361

They have re-enacted the provision, and with the further declaration, that every estate, vested in executors or trustees, as such, shall be held in joint tenancy.

7. Can husband and wife take by moieties ?—362

They cannot. But they are both seised of the entirety, and the survivor takes the whole ; and, during their joint lives, neither of them can

alien so as to bind the other. If an estate be conveyed expressly in joint tenancy, to a husband and wife, and to a stranger, the latter takes a moiety, and the husband and wife, as one person, the other moiety.

8. How would it be if the husband and wife had been seised of the lands as joint tenants, before their marriage ?—363

They would continue joint tenants afterwards, as to that land, and the consequences of joint tenancy, such as severance, partition, and the *jus accrescendi*, would apply. It is said, however, to be now understood, that husband and wife may, by express words, be made tenants in common by a gift to them during coverture.

9. How may joint tenancy be destroyed ?—363

It may be destroyed by destroying any of its constituent unities, except that of time.

10. What is the proper conveyance between joint tenants ?—364

It is a release; and each has the power of alienation over his *aliquot* share.

11. How may joint tenants sever the tenancy ?—364

Either voluntarily by deed, or they may compel a partition by writ of partition, or by bill in equity.

It is to be presumed, that the English statutes of 31 and 32 Henry VIII. have been generally re-enacted or adopted in this country, and, probably, with increased facilities for partition. They were re-enacted in New York, 6th of February, 1788; and the New York revised statutes have made further and more specific and detailed provisions for the partition of lands, held either in joint tenancy, or in common, and they have given equal jurisdiction over the subject to the courts of law, and of equity. In Massachusetts also, by statute, the writ of partition is not only given, but partition may be effected by petition without writ.

12. Is not the jurisdiction of chancery in awarding partition, well established, in England, by a long series of decisions ?—364

It is, and has been found, by experience, to be a jurisdiction of great public convenience.

13. When only does a court of equity interfere ?—364

Never, unless the title be clear, and never where the title is denied, or suspicious, until the party seeking a partition has had an opportunity to try his title at law. The same principle has been acted upon in the courts of equity in this country.

14. What have the New York revised statutes prescribed to the courts of law and the court of chancery, in respect to partition ?—365

That, whenever there shall be a denial of co-tenancy, an issue shall be formed, and submitted to a jury to try the fact; and the respective rights of the parties are to be ascertained and settled before partition be made, or a sale directed.

15. Who does a final judgment or decree, upon partition at law, under the revised statutes, bind ?—365

It binds all parties named in the proceedings, and having, at the time, any interest in the premises divided, as owners in fee, or as tenants for years; or as entitled to the reversion, remainder or inheritance, after the termination of any particular estate; or as having a contingent interest therein, or an interest in any undivided share of the premises, as tenants for years, for life, by the curtesy, or in dower.

But the judgment does not affect persons having claims as tenants in dower, by the curtesy, or for life, in the whole of the premises subject to the partition. It is likewise provided, in respect to the exercise of equity jurisdiction, in the case of partition, that if it should appear that equal partition cannot be made without prejudice to the rights and interests of some of the parties, the court may decree compensation to be made by one party to the other, for equality of partition, according to the equity of the case. This is the rule in equity, independent of any statute provision, when equity of partition cannot otherwise be made.

16. From what does an estate in coparcenary always arise ?—366

It always arises from descent.

17. In what three unities do coparceners resemble joint tenants?—366

Unities of title, interest, and possession.

18. But do not coparceners differ from joint tenants in other respects in a most material degree ?—366

They do. They are said to be seised like joint tenants, *per my et per tout;* and yet each parcener has a devisible interest; and the doctrine of survivorship does not apply to them. The shares of the partners descend severally to their respective heirs. They may sever their possession, and dissolve the estate in coparcenary, by consent, or by writ of partition at common law.

19. Who are tenants in common ?—367

They are persons who hold by unity of possession; and they may hold by several and distinct titles, or by title derived at the same time, by the same deed or descent. In this respect the American law differs from the English common law.

LECTURE LXV.

OF TITLE BY DESCENT.

1. What must there be to constitute a perfect title?—371

There must be the union of actual possession, the right of possession, and right of property. These several constituent parts of title may be divided and distributed among several persons, so that one of them may have the possession, another the right of possession, and the third the right of property. Unless they all be united in one and the same party, there cannot be that consolidated right, that *jus duplicatum*, or *droit droit*, or the *jus proprietatis et possessionis*, which, according to the ancient English law, formed a complete title.

2. By what two modes may title to land be acquired?—372

By descent and by purchase; the one is acquired by operation of law, and the other by the act or agreement of the parties.

3. What is a descent or hereditary possession?—374

It is the title whereby a person, on the death of his ancestor, acquires his estate by right of representation as his heir. In these United States, the English common law of descents, in its most essential features, has been universally rejected, and each state has established a law of descents for itself.

4. What is the first rule of inheritance?—375

It is, that if a person owning real estate dies seised, or as owner, without devising the same, the estate shall descend to his lawful descendants in the direct line of lineal descent; and if there be one person, then to him or her alone; and if more than one person, and all of equal degree of consanguinity to the ancestor, then the inheritance shall descend to the several persons as tenants in common, in equal parts, however remote from the intestate the common degree of consanguinity may be.

5. Is not this rule in favour of the equal claims of the descending line, in the same degree?—375

Yes. Without distinction of sex, to the exclusion of all other claimants. Thus, if A. dies, owning real estate, and leaves, for instance, two sons and a daughter, or, instead of children, leaves only two or more grandchildren, these persons being his lineal descendants, and all of equal degree of consanguinity to the common ancestor, that is, being all of them either his children, or grandchildren, or great grandchildren, they will partake equally of the inheritance as tenants in common.

6. When was this rule of descent prescribed by the statute of New York?—375

On the 23d of February, 1786; and it has been adopted by the New York revised statutes.

7. To what extent does this rule prevail in the United States?—375

It prevails in all the United States, with this variation, that, in South Carolina, the widow takes one-third of the estate in fee, and in Georgia, she takes a child's share in fee, if there be any children, and if none, she then takes a moiety of the estate; and in South Carolina or Georgia, the whole estate. In Rhode Island, New Jersey, North and South Carolina, and in Louisiana, the claimants take, in all cases, *per stirpes*, though standing in the same degree. In Alabama the descendants of children also take *per stirpes*.

8. Did not the rule of common law, under the statute of descents formerly exist in New York?—388

Yes, until 1786; and the heir was to deduce his title from the person dying seised. But the New York revised statutes have wisely altered the pre-existing law on this subject; and they have extended the title by descent generally to all the real estate owned by the ancestor at his death; and they include in the descent, every interest, legal and equitable, in lands, tenements, and hereditaments, either seised or possessed by the intestate, or to which he was in any manner entitled, with the exception of leases for years, and estates for the life of another person. This completely abolishes the English maxim, that *seisina facit stipitem*. So, likewise, in Massachusetts, Rhode Island, Connecticut, New Jersey, Pennsylvania, Delaware, Virginia, South Carolina, Georgia, and Ohio, and probably in other states, the real and personal estates are distributed among the heirs, without any reference or regard to the actual seisin of the ancestor. Reversions and remainders vested by descent in an intestate, pass to his heirs in like manner as if he had been seised in possession; and no distinction is admitted in descents between estates in possession, and in reversion. In the states of Vermont, New Hampshire, Maryland, and North Carolina, the doctrine of the *possessio fratris* would seem still to exist.

9. In case of posthumous descendants, to whom does the inheritance in the meantime descend, at the death of the intestate?—389

To the heir *in esse*. It was declared, by Lord Ch. J. De Grey, in the case of *Goodtitle* v. *Newman*, on the authority of a case in the Year Books, of 9 Hen. VI. 25. that the posthumous heir was not entitled to the profits of the estate before his birth, because the entry of the presumptive heir was lawful. This rule does not apply to posthumous children who take remainders, under the statute of 10 and 11 Wm. III. They must take the intermediate profits, says Lord Hardwicke; for they are to take in the same manner as if born in the lifetime of the father. This

construction of Lord Hardwicke applies to the New York revised statutes; for it is declared, that posthumous descendants shall, in all cases, inherit in the same manner as if born in the lifetime of the intestate.

10. What is the second rule of descents?—390

That, if a person dying seised, or as owner of land, leaves lawful issue of different degrees of consanguinity, the inheritance shall descend to the children and grandchildren of the ancestor, if any be living, and to the issue of such children or grandchildren as shall be dead, and so on to the remotest degree, as tenants in common. But such grandchildren, and their descendants, shall inherit only such share as their parents respectively would have inherited if living.

11. What is the third canon of inheritance?—393

That if the owner of lands dies without lawful descendants, leaving parents, the inheritance shall ascend to them, either first to the father and next to the mother, or jointly, under certain qualifications.

12. What is the fourth rule of inheritance?—400

That, if the intestate dies without issue, or parents, the estate goes to his brothers and sisters, and their representatives. If there be several such relatives, and all of equal degree of consanguinity to the intestate, the inheritance descends to them in equal parts, however remote from the intestate the common degree of consanguinity may be. If they all be brothers and sisters, or nephews and nieces, they inherit equally; but if some be dead leaving issue, and others living, then those who are living take the share they would have taken if all had been living, and the descendants of those who are dead inherit only the share which their parents would have received if living.

13. What is the fifth?—407

That in default of lineal descendants, and parents, and brothers and sisters, and their descendants, the inheritance ascends to the grandparents of the intestate, or to the survivor of them. This is not the rule that has recently been declared in New York, for that excludes, in all cases, the grandparents from the succession, and the direct lineal ascending line stops with the father.

14. What is the sixth?—408

That, in default of lineal descendants, and parents, and brothers and sisters, and their descendants, and grandparents, the inheritance goes to the brothers and sisters, equally, of both the parents of the intestate, and to their descendants. If all stand in equal degree of consanguinity to the intestate, they take *per capita;* and if in unequal degree, they take *per stirpes*.

This is the rule declared in New York, with the exception of the

grandparents; and I presume it may be considered, with some slight variations in particular instances, as a general rule throughout the United States. It is confined, in New York, to cases in which the inheritance had not come to the intestate on the part of either of his parents. The rule is controlled in that, and in some other states, by the following rule.

15. What is the seventh ?—409

That, if the inheritance came to the intestate on the part of his father, then the brothers and sisters of the father, and their descendants, shall have preference, and, in default of them, the estate shall descend to the brothers and sisters of the mother, and their descendants. But if the inheritance came to the intestate on the part of his mother, then her brothers and sisters, and their descendants, have the preference; and, in default of them, the brothers and sisters on the father's side, and their descendants, take. This rule is so declared in the New York revised statutes; and the adoption of the same distinction in several of the states, and the omission of it in others, has been already sufficiently shown, in discussing the merits of the fourth rule of inheritance.

16. What is the eighth rule ?—409

That on failure of heirs, under the preceding rules, the inheritance descends to the remaining next of kin to the intestate, according to the rules in the English statute of distribution of the personal estate, subject to the doctrine in the preceding rules in the different states, as to the half blood, and as to the ancestral estates, and as to the equality of distribution.

LECTURE LXVI.

OF TITLE BY ESCHEAT, BY FORFEITURE, AND BY EXECUTION.

1. Under what heads is title to land usually distributed ?—423

Under the heads of descent and purchase, the one title being acquired by operation of law, and the other by the act or agreement of the party. But titles by escheat and forfeiture are also acquired by the mere act of the law; and Mr. Hargrave thinks that the proper general division of title to estates, would have been by purchase, and by act of law, the latter including equally, descent, escheat, and forfeiture.

2. What additional title, unknown to the English common law, is added by American authors ?—423

Title by execution.

3. How was title by escheat created in the English law ?—423

It was one of the fruits and consequences of feudal tenure. When the blood of the last person seised became extinct, and the title of the tenant in fee failed, from want of heirs, or by some other means, the land resulted back, or reverted to the original grantor, or lord of the fee, from whom it proceeded, or to his descendants or successors. All escheats, under the English law, are declared to be strictly feudal, and to import the extinction of tenure. The opinions given in the great case of *Burgess* v. *Wheate*, concur in this view of the doctrine of escheat. But, as the feudal tenures do not exist in this country, there are no private persons who succeed to the inheritance by escheat; and the state steps in the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction.

4. Is not the forfeiture, at common law, of the estate for crimes, very much reduced in this country?—426

Yes, and the corruption of blood is universally abolished. In New York, forfeiture of property for crimes, is confined to the case of a conviction for treason; and, by a law of the colony of Massachusetts, as early as 1641, escheats and forfeitures, upon the death of the ancestor, "natural, unnatural, casual, or judicial," were abolished for ever.

5. What is the rule of law, as to the title which the state takes by escheat or forfeiture?—427

It takes the title which the party had, and none other. It is taken in the plight and extent by which he held it; and the estate of a remainderman is not destroyed or divested by the forfeiture of the particular estate.

6. Was title by execution known to the common law?—428–31

It was not, but owes its introduction to modern statutes. The mode which the creditor is required to pursue, varies in different states.

It is now provided by the New York revised statutes, that the real estate of the debtor may be sold on execution, either at law or in chancery, in default of goods and chattels, on six weeks' notice, and in separate parcels, if required by the owner. A certificate of the sale is to be delivered by the officer to the purchaser, and another certificate filed in the clerk's office of the county within ten days.

7. Is a sale so made, conditional or absolute?—431

Conditional; redemption of the lands sold may be made by the debtor, or his representative, within one year, on paying the amount of the bid, with ten per cent. interest. Any joint tenant, or tenant in common, may redeem his ratable share of the land by paying a due proportion of the purchase money. On default of the debtor, any creditor, by judgment at law, or decree in equity, and in his own right, or as a trustee, within three months after the expiration of the year, may redeem the land, on paying the purchase money, with seven per cent. interest. So, any other judgment creditor may redeem from such prior creditor. The redemption is allowed to be carried further, and is given to any other creditor, who may

redeem from the creditor standing prior to him. But all these subsequent redemptions must be within fifteen months from the time of the sale; for the officer is then to execute a deed to the person entitled, and the title so acquired becomes absolute in law.

LECTURE LXVII.

OF TITLE BY DEED.

1. What is a purchase, in the ordinary and popular acceptation of the term?—440

It is the transmission of property from one person to another, by their voluntary act and agreement, founded on a valuable consideration.

2. What is it in judgment of law?—440

It is the acquisition of land by any lawful act of the party, in contradistinction to acquisition by operation of law; and it includes title by deed, title by matter of record, and title by devise.

3. Were lands alienable in the time of the Anglo-Saxons?—441

They were, either by deed or by will, agreeable to respectable authorities.

4. How were they called, when conveyed by charter or deed?—441

Boc, or bookland, and the other kind of land, called folcland, was held and conveyed without writing. But this notion of the free disposition of the land among the Saxons, must be understood in a very qualified sense; and the *jus disponendi*, even at that day, was subject, as it is and ought to be, in every country, and in every stage of society, to the restraints and modifications suggested by convenience, and dictated by civil institutions. It was reserved, however, to the feudal policy, to impose restraints upon the enjoyment and circulation of landed property, to an extent then unprecedented in the annals of Europe.

5. In whose favour did these restraints arise?—442

They arose partly in favour of the heir of the tenant; but principally from favour to the lord of the fee. It was repugnant to the genius of the feudal system, to allow the land, which the chieftan had given to one family, to pass, without his consent, into the possession of another, perhaps to an enemy. The restrictions accorded with the doctrine of feuds; but were proper for that system only. As a part of the feudal fabric, they fell before the influence of freedom, commerce, and the arts.

6. When were the earliest innovations upon the feudal restraints made?—443

In the reign of Henry I., the first step taken in mitigation of the rigour of the law of feuds, and in favour of voluntary alienations, was the countenance given to the practice of subinfeudations.

7. Did not a law of Henry I. relax the restraints as to the purchased lands?—444

Yes, but retained it as to those which were ancestral. Under the statute *de donis* of 13 Edward I., fees conditional were changed into estates tail; and by construction of the courts, these were eluded, and the policy of the statute defeated by the fiction of a common recovery. The statute of *quia emptores*, 18 Edward I., permanently established the free right of alienation by the sub-vassel, without the lord's consent. The power of involuntary alienation, by rendering the land answerable by attachment for debt, was created by the statute of 13 Edward I., c. 18, which granted the *elegit;* and by the statutes merchant or staple, of 13 Edward I., and 27 Edward III., which gave the extent.

8. Who is capable of holding land by descent, devise, or purchase?—446

Every citizen of the United States; and every person capable of holding lands, except idiots, persons of unsound minds, and infants, and seised of, or entitled to, any estate, or interest in land, may alien the same at his pleasure, under the regulations prescribed by law.

9. Has not the statute of 32 Henry VIII., respecting pretended titles, which imposed a forfeiture upon the seller of the whole value of lands sold, and the same penalty upon the buyer, also, if he purchased, knowingly, been re-enacted in the state of New York?—447

Yes. This severe statute was re-enacted literally in New York, in 1788, but the penalty provisions are altered by the New York revised statutes, which have abolished the forfeiture, and made it a misdemeanor for any person to buy or sell, or make or take a promise or covenant to convey, unless the grantor, or those by whom he claims, shall have been in possession of the land, or of the reversion or remainder thereof, or of the rents and profits, for the space of a year preceding.

10. Does this provision apply to a mortgage of the lands?—447

No—nor to a release of the same to the person in lawful possession.

11. Was not a feoffment void, without livery of seisin?—448

Yes; and without possession a man could not make livery of seisin.

12. Is this principle peculiar to the common law?—448

No. It was a fundamental doctrine of the law of feuds, on the continent of Europe.

13. Is it not the settled doctrine, in the state of New York, that the purchase of land pending a suit concerning it, is *champerty?*—449

Yes. And the purchase is void, if made with a knowledge of the suit, and not in consummation of a previous bargain.

14. What is required, in the due execution of a deed?—449

It must be written on paper or parchment and signed, sealed, delivered and recorded.

15. Does not the law require more form and solemnity, in the conveyance of land, than in that of chattels?—450

It does, and this arises from the greater dignity of the freehold in the eye of the ancient law, and from the light and transitory nature of personal property, which enters much more deeply into commerce, and requires the utmost facility in its incessant circulation.

16. How were lands conveyed in the early periods of English history? —450

Usually without writing, but it was accompanied, with overt acts, equivalent, in point of formality and certainty, to deeds. As knowledge increased conveyance by writing became more prevalent; and finally, by the statute of frauds and perjuries, of 29 Charles II., all estates and interests in lands, (except leases not exceeding three years,) created, granted, or assigned, by livery and seisin only, or by parol, and not in writing, and signed by the party, were declared to have no greater force or effect than estates at will only.

17. How has the statute provision been received in the United States? —450

It has been either, expressly adopted, or assumed as law, throughout the United States. In New York, it has been enacted, in every successive revision of the statutes; and in the last revision it is made to apply, not only to every estate and interest in lands, but to every power, or trust, concerning the same; and the exception as to leases is confined to leases for a term not exceeding on year.

18. Does this provision, apply to trusts by implication, or operation of law?—450

No, nor is a parol promise to pay for the improvements made upon land within the statute of frauds. They are not an interest in land, but only another name for work and labour bestowed upon it. So a crop of growing potatoes, has been held not to be such a contract for the sale of any interest in land, as to require a writing, within the statute of frauds.

19. How must a conveyance be executed in England?—451

It is deemed essential in the English law to a conveyance of land, that it should be by writing, sealed and delivered; this rule of the common law is adopted and followed, with us with the exception of Louisiana, and is in some states made a statute provision. Part performance

of an agreement by parol to sell land, will in certain cases take the agreement out of the statute of frauds, and authorize a court of equity, to decree a specific performance of the contract.

20. What is a deed ?—452

A deed is an instrument in writing, upon paper or parchment, between parties able to contract, and duly sealed and delivered.

21. What did the common law intend by a seal ?—452

An impression upon wax, or wafer, or some other tenacious substance capable of being impressed.

22. Is sealing in the common law sense, requisite in every state in the union ?—452

Not in every state ; in the eastern states, sealing, in the common law sense, is requisite ; but in the southern and western states, from New Jersey inclusive, the impressions upon wax has been disused to such an extent, as to induce the courts to allow a flourish with the pen, at the end of the name, or a circle of ink, or scroll, to be a valid substitute for a seal.

23. Is delivery of a deed essential ?—454

It is, for it takes effect only from the delivery.

24. To whom may the deed be delivered ?—454

It may be delivered to the party himself to whom it is made, or to any other person authorized by him to receive it.

25. May it be delivered to a stranger as an *escrow* ?—454

It may, which means a conditional delivery to the stranger, to be kept by him until certain conditions be performed, and then to be delivered over to the *grantee*.

26. At what time does the estate pass, when the deed is delivered as an *escrow* ?—454

Not until the condition be performed, and the deed delivered over, till then the estate remains in the grantor.

27. When generally does an *escrow* take effect ?—454

Generally from the second delivery, and is to be considered as the deed of the party from that time ; but this general rule does not apply when justice requires a resort to fiction. The relation back to the first delivery, so as to give the deed effect from that time, is allowed in cases of necessity, to avoid injury to the operation of the deed from events happening between the first and second delivery.

28. What is the general principle of law on this subject?—454

That in all cases where it becomes necessary, for the purposes of justice, that the true time when any legal proceeding took place should be ascertained, the fiction of law introduced for the sake of justice, is not to prevail against the fact. It has been further held, that if the grantor deliver a deed as his deed, to a third person, to be delivered over to the grantee on some future event, as on the arrival of the grantee at York, it is a valid deed from the beginning, and the third person is but a trustee of it for the grantee.

29. May the delivery to the third person, for and on behalf of the grantee, amount to a valid delivery?—455

Yes; thus where A delivered a deed to B, to deliver to C as his deed, and B did so, and though C refused to accept of it, the deed was held to enure from the first delivery.

30. What reason does the law assign for this?—455

It is this: because the deed was not delivered as an *escrow*, or upon a condition to be performed. So, if a deed be duly delivered in the first instance, it will operate, though the grantee suffer it to remain in the custody of the grantor.

31. What is required to make a deed valid against *bona fide* purchasers?—456

By the statute law of every state in the union, all deeds and conveyances of land, except certain chattel interests, are required to be recorded, upon previous acknowledgment of proof.

32. Against whom only, will a deed be good, if not recorded?—456

Only—as against the grantor and his heirs.

33. Upon what does the mode and effect of proof depend?—457

Upon the local laws of the several states.

34. Does not the New York revised statutes contain specific directions on the subject of the proof?—458

They do, and also of the manner of recording conveyances of real estate.

35. Do the New York revised statutes make any provision as to the number of witnesses requisite to a deed?—458

None whatever; and consequently, the common law rule applies, that one witness is sufficient, or the acknowledgment before the officer without any witness.

36. Is the practice of recording deeds in England, limited or general? —459

It is of local and very limited application. It applies to the Bedford level tract, to the ridings of Yorkshire, and to the county of Middlesex.

37. Was there not during the period of the English commonwealth, an effort to establish county registers, for recording deeds throughout England ?—459

There was.

38. Was not the ancient policy in favour of the entire publicity of transfers of land, by the fine of record, the livery under the feoffment, the enrolment of a bargain and sale, and the attornment under the grant ?—459

Yes. But the ingenuity of conveyancers, and the general and natural dispositions to withdraw settlements, and the domestic arrangements, from the idle curiosity of the public, have defeated that policy.

39. How is it now in Scotland ?—459

The old feudal forms, and the *sasine*, or symbolical tradition of the land are retained.

40. Of what does a deed consist ?—460

It consists of the names of the parties, the consideration for which the land was sold, the description of the subject granted, the quantity of interest conveyed, and, lastly, the conditions, reservations, and covenants, if any there be.

41. What said Sir Henry Spelman, of the deeds of the Saxons ?—460

He says, that they "observed no set form, but used honest and perspicuous words to express the thing intended with all brevity, yet not wanting the essential parts of a deed, as the names of the donor and donee, the consideration, the certainty of the thing given, the limitation of the estate, the reservation, and the names of the witnesses." This brevity and perspicuity, so much commended by Spelman, has become quite lost, or but dimly perceived, in the cumbersome forms and precedents of the English system of conveyancing.

42. Does not the forms in New York, and in those parts of the United States which adhere the most to the English practice, still retain the language of a mutual contract, executed by both parties ?—460

Yes. And each of them is supposed, by the fiction implied in the more formal parts of the *indenture*, to retain a copy. But the essential parts of a conveyance of land in fee are brief, and require but few words. If a deed of feoffment, according to Lord Coke, be without *premises*, *habendum*, *tenendum*, *reddendum*, clause of warranty, &c., it is still a good

deed, if it gives lands to another, and to his heirs, without saying more, provided it be sealed and delivered, and be accompanied with livery.

43. What is the usual form of conveyance in the United States ?—461

It is usually by bargain and sale, and possession passes *ex vi facti.*

44. What requisites are required ?—462

The parties must be competent to contract, and truly and sufficiently described.

45. How has a grant to the people of a county been held ?—462

To be void; because the statute enabling supervisors of counties to take conveyances of land, applied only to conveyances made to them by their official name.

46. Is a grant to the inhabitants of a town not incoporated, valid ?—462

It is not.

47. Are not conveyances good in many cases, when made to a grantee by a certain designation, without the mention of either the christain or surname ?—462

Yes. As to the wife of I. S., or to his eldest son, for *id est certum, quod potest reddi certum.*

48. Is a consideration essential to a good and absolute deed ?—462

It is generally so held; but a gift, or voluntary conveyance will be effectual as between the parties, and is only liable to be questioned in certain cases, when the rights of creditors and subsequent purchasers are concerned.

49. Must the consideration be either good or valuable ?—464

Yes. And not partaking of any thing immoral or illegal, or fraudulent.

50. Is it not a universal rule, that it is unlawful to contract to do that which it is unlawful to do ?—464

Yes. And every deed and every contract are equally void, whether they be made in violation of a law which is *malum in se*, or only *malum prohibitum.*

51. What is a good consideration founded upon ?—464

Upon natural love and affection between near relations by blood; but a valuable one is founded on something deemed valuable, as money, goods, services, or marriage.

52. What is the rule respecting the description of the land conveyed ?—466

The rule is, that known and fixed monuments control courses and distances. So, the certainty of metes and bounds will include, and pass all the lands within them, though they vary from the given quantity expressed in the deed. The least certain and material parts of the description must yield to those which are the most certain and material.

53. Does the mention of quantity of acres, after a certain description of the subject by metes and bounds, or by other known specification, amount to any covenant ?—466

It does not: it is but matter of description—nor does it afford ground for the breach of any of the usual covenants, though the quantity of acres should fall short of the given amount.

54. Whenever it appears by the definite boundaries, or by words of qualification, as "more or less," or as "containing by estimation," or the like, that the statement of the quantity of acres in the deed is mere matter of description, and not of the essence of the contract, how does the buyer take it ?—467

He takes it at the risk of the quantity, if there be no intermixture of fraud in the case.

55. How was the *habendum* originally used ?—468

To determine the interest granted, or to lessen, enlarge, explain, or qualify the premises. It is now generally considered but a mere form. If, however, the premises should be merely descriptive, and no estate be mentioned, then the *habendum* becomes efficient to declare the intention; and it will rebut any implication arising from the silence of the premises.

56. What five covenants are usually inserted in a conveyance of the fee ?—471

1. That the grantor is lawfully seised.
2. That he has good right to convey.
3. That the land is free from incumbrances.
4. That the grantee shall quietly enjoy.
5. That the grantor will warrant and defend the title against all lawful claims.

57. Which three are personal covenants ?—471

The first three of the five above named. Those three do not run with the land, nor pass to the assignee.

58. Are the covenant of warranty, and the covenant for quiet enjoyment, in the nature of real covenants ?—471

Yes: and they run with the land conveyed, and descend to heirs, and vest in assignees.

59. Are not damages allowed on eviction, for improvements, made by the purchaser?—475

None *whatever*.

60. If an incumberance has not been extinguished by the purchaser, and there has been no eviction under it, what damages can he recover?—476

Nominal damages only, if the eviction be only of a part of the land purchased, the damages are a ratable part of the original price; and they are to bear the same ratio to the whole consideration, that the value of the land, to which the title has failed, bears to the value of the whole tract.

61. Does the French code adopt the same rule of compensation on eviction of part only of the subject?—477

Yes; but it allows the whole sale to be vacated, if the eviction be of such consequence, relatively to the whole purchase, that the purchase would not have been made without the part lost.

62. Does not this have the appearance of refined justice?—477

It does; but the prosecution of such an inquiry must, in many cases, be very difficult and delusive; and this part of the provision, allowing the contract to be rescinded, has been dropped in Louisiana.

63. What did the French law give prior to the revolution?—478

It gave to the buyer a compensation for improvements, and the increased value of the land, in addition to the restitution of the price, with interest and costs. It was founded on the Roman law; but the provision was destitute of fixedness and precision.

64. What effect did the code Napoleon have upon this rule?—478

It rescued the rule from the guidance of loose and arbitrary discretion, and reduced it to certainty.

65. What does that code allow the purchaser on eviction?—478

To recover the price, and the *mesne* profits which he is obliged to pay to the owner, and his costs and expenses, and the increased value of the lands, independent of the acts of the purchaser, and also the beneficial improvements which he may have made.

66. Does the rule in the French code operate with equality and justice?—478

It does not; the vendor is bound to pay for the increased value of the land; and yet if it happens to be diminished in value at the time of eviction, the vendor is not less bound to refund the purchase money.

67. What has the civil code of Louisiana provided on this subject?—478

Closely copied the general provisions of the French code; but it has omitted this inequality of regulation; and it likewise confines the recovery to the price, mesne profits, costs and special damages, (if any,) and beneficial improvements.

68. On what does the manner of assigning breaches, on these various covenants depend?—479

Upon the character of the covenant.

69. How many kinds of conveyances are there?—480

There are two kinds; first, conveyances at common law; second, conveyances under the statute of uses.

70. How is the first class subdivided?—480

Into original and derivative conveyances.

71. What was a feoffment?—480

It was the mode of conveyance in the earliest periods of the common law.

72. With what was the feoffment accompanied?—480

With actual delivery of possession of the land, termed livery of seisin.

73. How was livery of seisin performed?—480

It was performed by the entry of the feoffor upon the land, with the charter of feoffment, and delivering a clod, turf, or twig, or the latch of the door, in the name of seisin of all the lands contained in the deed.

74. What was the ceremony of granting a feud?—480

Open and notorious delivery of possession in the presence of the freeholders of the neighbourhood.

75. Did the feoffment operate upon the possession?—481

Yes; without any regard to the estate or interest of the feoffor.

76. Has not the conveyance by feoffment, with livery of seisin, long since been obsolete in England?—489

Yes; and though it has been, in this country, a lawful mode of conveyance, it has not been used in practice. Our conveyances have been either under the statute of uses, or short deeds of conveyance, in the nature of the ancient feoffment, and made effectual, on being duly recorded, without the ceremony of livery. The New York revised statutes have expressly abolished the mode of conveying lands by feoffment, with livery of seisin.

77. What was a grant?—490

It was a common law conveyance, and applied to incorporeal hereditaments, such as reversion, rents, and services; and, not being of a tangible nature, and existing only in contemplation of law, they could not be conveyed by livery of seisin. Such rights were said to lie in grant, and not in livery, and they were conveyed simply by deed.

78. What was the difference between a feoffment and a grant?—490

There was this essential difference between a feoffment and a grant: while the former carried destruction in its course, by operating upon the possession, without any regard to the estate or interest of the feoffor, the latter benignly operated only upon the estate or interest which the grantor had in the thing granted, and could lawfully convey.

79. What did the common law require, to render the grant effectual?—490

It required the consent of the tenant of the land out of which the rent, or other incorporeal interest, proceeded; and this consent was called attornment; but this is now abolished in the United States.

80. Have not the New York revised statutes rendered the attornment of the tenant unnecessary to the validity of a conveyance by his landlord?—491

Yes. But to render him responsible to the grantee, for rent or otherwise, he must have notice of the grant. Nor will the attornment of a tenant to a stranger be valid, unless made with his landlord's consent, or in consequence of a judgment or decree, or to a mortgagee, after forfeiture of the mortgage.

81. Have not the New York revised statutes given to deeds of conveyance of the inheritance or freehold, the name of grants?—491

Yes. And though deeds of bargain and sale, and of lease or release, may continue to be used, they are to be deemed grants.

82. What is the nature and effect of a covenant, to stand seised to uses?--492

By this conveyance, a person seised of lands, covenants that he will stand seised of them to the use of another. On executing the covenant, the other party becomes seised of the use of the land, according to the terms of the use; and the statute of uses immediately operates, and annexes he possession to the use.

83. Can any use be raised for any purpose by this conveyance, in favour of a person not within the influence of the domestic consideration?—493

No. And it makes no difference whether the grantee, if he be a stranger, to the consideration, is to take on his own account, or as a mere trustee for some of the family connexions. He is equally incompetent to take.

84. If the covenant to stand seised, be founded on the requisite consideration, would not then the grant be good?—493

Yes. And it is admitted, that in a covenant to stand seised any words will do, that sufficiently indicate the intention.

85. What is the usual mode of conveyance in England?—494

That of lease and release,—because it does not require the trouble of enrolment. It was contrived by Sergeant Moore, at the request of Lord Norris, for a particular case, and to avoid the unpleasant notoriety of livery, or attornment. It was the mode universally in practice in New York, until the year 1788.

86. What mode of conveyance is most prevalent in the United States?—497.

That of bargain and sale; and it was in universal use in New York, prior to the introduction of the grant, by the revised statutes, in January, 1830.

LECTURE LXVIII.

OF TITLE BY WILL OR DEVISE.

1. What is a will?—501

A will is a disposition of real and personal property, to take effect after the death of the testator. When the will operates upon personal property, it is sometimes called a testament; and when upon real estate a devise; but the more general, and the more popular denomination of the instrument, embracing equally real and personal estates, is that of last will and testament.

2. Were lands devisible to a qualified extent, with the Anglo-Saxons?--503

It seems so. But, upon the establishment of the feudal system, at the Norman conquest, lands held in tenure ceased to be devisible.

3. What exceptions were there to this restraint?—504

Burgage tenures, and lands in gavelkind.

4. When did the disposition of real property by will, become absolute? —504

In the beginning of the reign of Charles II.

5. Was not the English law of devise, imported into this country by our ancestors?—504

Yes. And incorporated into our colonial jurisprudence, under such modifications, in some instances, as were deemed expedient. Lands may be devised by will, in all the United States.

6. What is the general rule, as to the parties to a devise?—505

That all persons of sound mind are competent to devise real estate, with the exception of infants and married women; a *feme covert*, may devise, by way of the execution of a power; but the will that she makes, in such a case, must be executed with the same solemnities as if she had executed the will while sole; and the statute of New York excludes the exercise of such power, during infancy.

7. May testaments of chattels be made by infants?—506

They may in conformity with the English rule, females at the age of 12, males at the age of 14.

8. Are the laws in the several states uniform on this point?—506

They are not, and by the New York revised statutes, the age to make a will of personal estate is raised up to 18 in males, and 16 in females; nor can a married woman make a testament of chattels, any more than of lands, except under a power or marriage contract.

9. May infants, *femes covert*, and persons of nonsane memory, and aliens be devisees?—506

Yes, for the devise is without consideration; a devise to the heir at law is void, if it gives precisely the same estate that the heir would take by descent, if the particular devise to him was omitted out of the will.

10. Which, in this case, has the precedence, title by descent, or by devise?—506

Title by descent.

11. If the lands be devised to the heir charged with debts, by what will he take, and why?—507

By descent, for the charge does not operate as an alteration of the estate.

12. Are not corporations excepted out of the English statute of wills? —507

Yes, corporations are excepted out of the English statute of wills, and

the object of the law was to prevent property from being locked up in perpetuity, and also to prevent, languishing and dying persons, from being imposed upon by false notions of merit or duty, to give away their estates from their families.

13. What says the New York revised statutes on this subject ?—507

That no devise to a corporation shall be valid, unless the corporation be expressly authorized to take by devise.

14 Are witnesses to a will, rendered incapable of taking any beneficial interest under it ?—509

Yes, except they be creditors, whose debts, by the will, are made a charge on the real estate.

15. What is the settled rule of the English law, respecting things devisible ?—510

That the testator must be seized of the lands devised at the time of making the will. The devise is in the nature of a conveyance, or an appointment of a particular estate; and therefore lands, purchased after the execution of the will, do not pass by it: the testator must likewise continue seized at the time of his death.

16. Have not the New York revised statutes made devises prospective ? —512

Yes, by declaring that every estate, and interest descendible to heirs, may be devised; and that every will made in express terms, of all the real estate, or in any other terms denoting the testator's intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death. The law in Pennsylvania and Virginia is the same as that now in New York. Rights of entry which are devisible even though there be an adverse possession or disseisin.

17. Has a joint tenant an interest which is devisible ?—513

He has not; the reason given by Lord Coke is, that the surviving joint tenant has an interest, which first attaches at the death of the joint tenant making the will; and he insists, that there is a priority of time in an instant; and Mr. Butler refers to another case in which that subtlety was applied.

18. What in general are the formalities required in the execution of a will of real estate ?—513

The general provision on this subject is, that the will of real estate must be in writing, and subscribed by the testator, or acknowledged by him in the presence of at least two witnesses, who are to subscribe their names as witnesses. The regulations in the several states differ in some unessential points; but generally they have adopted the directions given by the English statute of frauds, of 29 Charles II By the New York revised statutes, the testator is to subscribe the will at the end of

it, in the presence of at least two witnesses, who are to write their places of residence opposite their names, under the penalty of fifty dollars; but the omission to do it will not affect the validity and efficiency of their attestation. In Vermont, the will is required to be sealed; but this is peculiar to that state. Three witnesses, as in the statute of frauds, are required, in Vermont, New Hampshire, Maine, Massachusetts, Rhode Island, Connecticut, New Jersey, Maryland, South Carolina, Georgia, Alabama, and Mississippi. Two witnesses only, are requisite, in New York, New Jersey, Delaware, Virginia, Ohio, Illinois, Indiana, Missouri, Tennessee, North Carolina, and Kentucky. In some of the states, the provision as to attestation is more special. In Pennsylvania, a devise of lands in writing will be good without any subscribing witnesses, provided the authenticity of it can be proved by two witnesses. So in Virginia, two subscribing witnesses do not seem to be indispensable, provided the will has been wholly written out, and signed by the testator. In North Carolina and Tennessee, a will of land may be good, under special circumstances, without any subscribing witnesses.

19. Does not the English statute of frauds, require the will to be signed by the devisor, and to be attested and subscribed by the witnesses, in his presence?—514

Yes; and this direction has been extensively followed in the statute laws of this country.

20. To what extent have the revised statutes altered the former law of New York?—515

So far, as to require the signature of the testator, and of the witnesses, to be at the end of the will; and the testator, when he signs or acknowledges the will, is to declare the instrument to be his last will; and he is to subscribe or acknowledge the will, in the presence of each witness; and the witnesses are to subscribe their names at the request of the testator.

21. Have not the English court, from a disposition to favour wills, departed from the strict construction and obvious meaning of the statute of frauds?—515

They have, and thereby opened a door to very extensive litigation. It was held to be sufficient, that the testator wrote his name at the top of the will, by way of recital; and his name, so inserted, was deemed signing the will within the purview of the statute.

22. Has not the doctrine of a constructive presence of the testator been carried very far?—515

Yes: and it has been decided that if the witnesses were within view, and where the testator might, or had the capacity to see them, with some little effort, if he had the desire, though in reality he did not, they were to be deemed subscribing witnesses in his presence.

23. Has it not been further held, that if the testator produced to the

witnesses a will already signed and acknowledged the signature in their presence, it was a sufficient compliance with the statute ?—515

Yes.

24. Is it held necessary that the witnesses should attest in the presence of each other ?—516

It is not, nor is it necessary they should attest every page or sheet, or that they should know the contents.

25. Must the subscribing witnesses all attest at one time ?—516

It is not particularly requisite.

26. Was a will of chattels good without writing at common law ?—516

It appears it was, in ignorant ages, there was no other way of making a will but by words or signs. But, by the time of Henry VIII., and especially in the ages of Elizabeth and James, letters had become so generally cultivated, and reading and writing so widely diffused, that verbal unwritten, or nuncupative wills, were confined to extreme cases, and held to be justified only upon the plea of necessity.

27. What has the New York revised statutes declared, respecting nuncupative or unwritten wills ?—517

They have declared, that no nuncupative or unwritten will, shall not be valid, unless made by a soldier while in actual military service, or by a marine while at sea.

28. What is required in the English ecclesiastical courts, respecting a nuncupative will ?—518

That it be proved by evidence more strict and stringent, than that applicable to a written will, even in addition to all the requisites prescribed by the statute of frauds.

29. How are the laws of Louisiana in respect to last wills ?—519

Wills, under the code of that state, are of three kinds ; nuncupative or open, mystic or sealed, and olographic. They are all to be in writing. The first, or nuncupative testament, is to be made by a public act before a notary, in the presence of three, or five witnesses, according to circumstances ; and to be signed by the testator and witnesses ; or it may be executed by his private signature, in the presence of three, or five, or seven witnesses, according to circumstances, and they are to subscribe it. The second, or mystic testament, is to be signed by the testator, and sealed up, and presented to a notary and seven witnesses, with a declaration that it is his will ; and the notary and witnesses are to subscribe the superscription. The third, or olographic testament, is one entirely written, and signed by the testator, and subject to no other form, and may be made out of the state.

30. Is not a will, duly made according to law, in its nature ambulatory during the testator's life, and revocable at his pleasure?—520

Yes. But to prevent the admission of loose and uncertain testimony, countervailing the operation of an instrument made with the formalities prescribed, it is provided that the revocation must be by another instrument executed in the same manner; or else by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his directions.

31. May not a will be revoked by implication, or inference of law?—521

Yes. And these revocations are not within the purview of the statute; and they have given rise to some of the most difficult and interesting discussions existing on the subject of wills. They are founded upon the reasonable presumption of an alteration of the testator's mind, arising from circumstances since the making of the will, producing a change in his previous obligations and duties. The case stated by Cicero, is often alluded to, in which the father, on the report of the death of his son, who was then abroad, altered his testament, and appointed another person to be his heir. The son returned after the father's death, and the centumviri restored the inheritance to him. There is a case mentioned in the Pandects to the same effect; and it was the general doctrine of the Roman law, that the subsequent birth of a child, unnoticed in the will, annulled it. This is the rule in those countries which have generally adopted the civil law, *Testamenta rumpiuntur agnatione posthumi;* and there is not perhaps, any code of civilized jurisprudence, in which this doctrine of implied revocation does not exist, and apply when the occurrence of new social relations and moral duties raises a necessary presumption of a change of intention in the testator.

32. In what court was the first case that recognized in England, the rule, that the subsequent birth of a child was a revocation of a will of personal property?—522

It was decided by the court of delegates upon appeal, in the reign of Charles II.; and it was grounded upon the law of the civilians.

33. Can a testator devise all his estate to strangers, and disinherit his children?—525

There is no doubt of it. This is the English law, and the law in all the states, with the exception of Louisiana. Children are deemed to have sufficient security in the affection of parents, that this unlimited power of disposition will not be abused. If, however, the testator has not given the estate to a competent devisee, the heir may take it, notwithstanding the testator may have clearly declared his intention to disinherit him.

34. If the will disposes of the whole estate, and the testator afterwards marries, and has issue born in his lifetime, or after his death, and the wife

or issue be living at his death, is the will deemed revoked by the New York revised statutes?—527

Yes; unless the issue be provided for by the will, or by a settlement, or unless the will shows an intention not to make any provision.

35. Is the will of a *feme sole* revoked by her marriage?—527

It is; and this is an old and settled rule of law; and the reason of it is, that the marriage destroys the ambulatory nature of the will, and leaves it no longer subject to the wife's control.

36. Is a will deemed to be revoked by a second will?—528

Yes; provided it contains words of revocation, or makes a different disposition of the property.

37. Will a sale of the estate devised, operate as a revocation?—528

It will; for the testator must die while owner of the land, or the will cannot have effect upon it.

38. Will a valid agreement, or covenant to convey lands, which equity will specifically enforce, also operate in equity as a revocation of a previous devise of the same?—528

It will. It is as much a revocation of the will in equity, as a legal conveyance of the land would be at law; for the estate, from the time of the contract, is considered as the real estate of the vendee.

39. What is a codicil?—531

A codicil is an addition, or supplement to a will, and must be executed with the same solemnity.

40. What says the New York revised statutes, respecting the destruction or revocation of a second will, reviving the first?—532

They have dispensed with all refinements on this point. In no case does the destruction or revocation of a second will, revive the first, unless the intention to revive it be declared. Those statutes have essentially changed the law on the subject of these constructive revocations, and rescued it from the hard operation of those technical rules, of which we have complained, and placed it on juster, and more rational grounds.

41. What is the first and great object of enquiry in the construction of a will?—533

The intention of the testator; and to this object, technical rules are, to a certain extent, made subservient.

42. Is the word heirs requisite to convey a fee?—535

It is not; but the other words denoting an intention to pass the

whole interest of the testator as a devise of all my estate, all my interest, all my property, my whole remainder, all I am worth or own, all my right, and my title, or, all I shall die possessed of, and many other expressions of the like import, will carry an inheritance, if there be nothing in the other parts of the will to limit or control the operation of the words.

END OF VOLUME FOUR.

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GLOSSARY.

Ab initio,	From the beginning.
Ad litem,	To litigate.
Ad locum rei sitæ,	The place where the thing is situated.
A mensa et thoro,	From board and bed.
Animo furandi,	With an intention of stealing.
Autre fois aquit,	Upon another time acquitted.
Aqua currit et debet currere,	Water runs and owes to run, or should be suffered to run.
A vinculo matrimonii,	From the band or obligation of marriage.
A provisione viri,	From provision of the man.
Bona fide,	In good faith.
Casus fœderis,	Case of the contract or within the contract.
Causa metus,	By reason of fear.
Causa impotentia,	By reason of weekness or inability.
Causa mortis,	By reason of death.
Cestui qui trust,	One for whom a trust is created.
Champerty,	Purchasing suits at law.
Chose in action,	A thing, debt, or right for which a suit may be maintained.
Collegium fabrorum,	A corporation or society of smiths.
Commercia belli,	Intercourse or correspondence of war.
Consolato del mare,	Director or oracle of the sea; consulship.
Comitas inter communitates,	Curtesy between communities.
Commendam,	Given to one in trust and for his advancement.
Comodatum,	A loan with interest.
Caveat emptor,	Purchaser beware.
De facto,	In fact, acting.
Del credere,	Of the credit.
De bonis non,	Of goods not.
Depositum,	Goods placed with another tó keep without reward.
De jure,	Of right, in law.
Dominium rectum,	Authority to rule or govern.
Dominium utile,	Right or power to use.
Dum sola,	While single.
Durante viduitate,	During widowhood.
Ex comitate,	From curtesy.
Ex properia vigore,	From its own force.
Ex post facto,	After the act done.
Ex ceptio rei judicatæ,	Saving of the thing in judgment.
Ex delicto,	From failure in duty.
Ex contractu,	From contract.

Ex vi facti,	By force of the act.
Ex parte,	From one party.
Eo nomine,	By that name.
En autre droit,	In right of another.
Esterpement,	Waste
Elegit,	Elects, right to elect.
Femme sole,	Unmarried woman.
Femme covert,	Married woman.
Fera naturæ,	Of a wild nature.
Fieri facias,	Cause to be made.
Fidelitates,	Of fidelity.
Fidea commissa,	Things given to another in trust.
Habendum,	To have.
Habeas corpus,	Have the body.
Id ist certum quod potest reddi certum,	It is certain that may be rendered so.
In esse,	In being.
In pari materia,	Relating to like matters.
In delicto,	In the neglect of duty.
In transitu,	On the passage.
In rem,	Against the thing.
In solido,	All together as one.
In facæ ecclesia,	In the face of the church.
Inter vivos,	Between living persons.
Ipso facto,	By the act itself.
Jure gentium,	By the law of nations.
Jure mariti,	By right of the marriage.
Jus accrescendi,	Law of accretion or increasings.
Jus post liminii,	The law of those who were killed in battle or returned from captivity, by provision of which they were supposed never to have been absent.
Juris et de jure,	Of the law and by right.
Jus disponendi,	Right of disposing of.
Jetison,	A thing cast overboard.
Jure belli,	By right of war.
Lex loci contractus,	Law of the place of the contract.
Lex domicilii,	Law of the domicile.
Lex loci rei citæ,	Law of the place where the thing is situated.
Lex fori,	Law of the court as to proceedings.
Lis pendens,	Suit depending.
Lege loci,	By the local law.
Locatio,	Letting for hire.
Locatio aperis faciendi,	Letting of services for hire.
Location custodia,	Letting to keep for hire, as upon storage, or commission.
Majori summæ minor in est,	In the greater sum the less is contained.
Malum in se,	Bad in itself.
Malum prohibitum,	Bad because prohibited.
Mandatum,	Commission without reward.
Nec erit alia lex Romæ, alia Athaenis, alia nunc, alia posthac, sed et omnes gentes, et omni tempore una lex et sempiterna et immortalis continebit.	It is not the law of Rome, neither of Athens; nor of now, nor hereafter, but it is one law of all people, and of all time, and is of universal and eternal obligation.

Non compos mentis,	Not of sound mind.
Nudem pactum,	A naked agreement.
Nolens volens,	Unwilling or willing.
Nullius filius,	No man's son.
Nemo protest plus juris in alium transferre quam ipso habet,	No one may convey greater right to another than he himself has.
Patrem habere non inteliguntur,	To have a father unknown.
Per verba de presenti,	By words in the present tense.
Per verba de futuro,	By words in the future tense.
Per autre vie,	By another life.
Per capita,	By heads.
Per formam doni,	By the form of the gift.
Per stirpes,	By roots.
Prima facie,	First face, first view.
Pro forma,	According to form, for forms.
Possessio fratris,	Possession of the brother.
Pupillius pati non inteligitur,	The infant is protected by not understanding.
Pro hac vici,	For that time or occasion.
Prorata itineris,	According to the distance passed.
Pro tanto,	For so much.
Qoud damno fatali contingit, cuivis diligentissimo possit contingere.	Damage which happens because of fate and which the utmost diligence may not prevent.
Qui nolent inter se contendere, solent per nuntiam rem emere in commune quod a societate longe remiotum,	They who are not willing between themselves to undertake as mutually bound, according to their custom, by agent may purchase a thing in common; and yet from a partnership be far remote.
Quia emptores,	As to purchasers.
Quare clausum fregit,	Why the close is broken.
Reddendum,	The return or render.
Respodentia,	Things bound or pledged.
Res judicatæ,	Thing adjudicated.
Scandalum magnatum,	Slander of the great.
Sub potestate viri,	Under the control of the man.
Salva fide et ligentia domini regis,	Preserving faith and leigance to the lord the king.
Seisina facit stipitem,	Seisin makes the stock.
Stricti juris,	Of positive law.
Sub modo,	Under some circumstances, in a special manner.
Subpœna,	Under penalty.
Supra protest,	Upon protest, after having been protested.
Tenendum,	To hold.
Unde nihil habet,	By what means, or why she has nothing.

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